

24
No. 93-527-CSX
Status: GRANTED

Title: Board of Education of Monroe-Woodbury Central School District, Petitioner
v.
Louis Grumet et al.

Docketed:
October 4, 1993

Court: Court of Appeals of New York

Vide:
93-517
93-539

Counsel for petitioner: Reich, Lawrence Walter
Counsel for respondent: Worona, Jay, Abrams, Robert

Entry Date Note Proceedings and Orders

1	Oct 4 1993	G	Petition for writ of certiorari filed.
2	Oct 29 1993		Brief of respondents Louis Grumet and Albert Hawk in opposition filed. VIDE.
3	Nov 3 1993		DISTRIBUTED. November 24, 1993 (Page 3)
4	Nov 9 1993	X	Reply brief of petitioners filed.
5	Nov 29 1993		Petition GRANTED.

7	Dec 2 1993		Order extending time to file brief of petitioner on the merits until January 21, 1994.
8	Jan 19 1994		Brief of petitioner Board of Education Monroe-Woodbury Central School Dist. filed. VIDE.
9	Jan 21 1994		Brief amicus curiae of United States Catholic Conference filed. VIDE.
10	Jan 21 1994		Brief amicus curiae of Rutherford Institute filed. VIDE.
11	Jan 21 1994		Brief amicus curiae of Institute for Religion and Polity filed. VIDE.
12	Jan 21 1994		Brief amicus curiae of Southern Baptist Convention Christian Life Commission filed. VIDE.
13	Jan 21 1994		Brief amicus curiae of National Jewish Commission on Law and Public Affairs filed. VIDE.
15	Jan 21 1994		Brief amicus curiae of Agudath Israel of America filed. VIDE.
14	Jan 24 1994		Joint appendix filed. VIDE.
16	Feb 2 1994		SET FOR ARGUMENT WEDNESDAY, MARCH 30, 1994. (1ST CASE).
17	Feb 7 1994	G	Motion of petitioner Board of Education of the Kiryas Joel Village School District for divided argument filed. CIRCULATED.
18	Feb 10 1994		
19	Feb 22 1994		Motion of petitioner Board of Education of the Kiryas Joel Village School District for divided argument GRANTED.
20	Feb 22 1994	X	Brief amici curiae of Americans United for Separation of Church and State, et al. filed.
21	Feb 22 1994	X	Brief amici curiae of New York State United Teachers, et al. filed. VIDE.
28	Feb 22 1994	X	Brief amici curiae of National Council of Churches of Christ in the U.S.A., et al. filed. VIDE.
22	Feb 23 1994	X	Brief amicus curiae of National School Boards Association filed. VIDE.
23	Feb 23 1994	X	Brief amici curiae of Natl. Coalition for Public Educ. and Religious Liberty, et al. filed. VIDE.
24	Feb 23 1994		LODGING consisting of 12 copies of a document received from amici curiae, National Coalition for Public

Entry	Date	Note	Proceedings and Orders

			Education and Religious Liberty.
25	Feb 23 1994	X	Brief amicus curiae of Council on Religious Freedom filed. VIDE.
26	Feb 23 1994	X	Brief amicus curiae of Committee for the Well-Being of Kiryas Joel filed. VIDE.
27	Feb 23 1994		LODGING consisting of 40 sets of 5 documents received from amicus curiae Committee for the Well-Being of Kiryas Joel.
29	Feb 23 1994	X	Brief amici curiae of National Jewish Congress, et al. filed. VIDE.
30	Feb 23 1994	X	Brief of respondents Louis Grumet, et al. filed. VIDE.
31	Feb 23 1994	X	Brief amicus curiae of General Council on Finance and Administration of the UMC filed. VIDE.

93 - 527 .

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 1

In the Supreme Court of the United States

OCTOBER TERM, 1993

**BOARD OF EDUCATION OF THE
MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,**

Petitioner,

-against-

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

**ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE STATE OF NEW YORK**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Chapter 748 of the 1989 Laws of the State of New York creates a Kiryas Joel Village School District with boundaries coterminous with the existing boundaries of the Incorporated Village of Kiryas Joel. Virtually all of the residents of such Incorporated Village are Orthodox Jews who are members of the Satmar Hasidic community. Property within the Village is privately owned. There are no restrictive covenants prohibiting alienation of the parcels to non-Satmarer.

The trustees of the public school district created by the Chapter are popularly-elected by District residents, and they exercise the same duties and responsibilities as other public school trustees. The school established thereunder offers exclusively secular special education programs and services to handicapped students residing within the Village at a public site; it employs teachers and ancillary staff on a non-sectarian basis to instruct such students; and it follows a state-prescribed curriculum. It does not operate a traditional elementary or secondary school for non-handicapped district students, because such students choose to attend the parochial schools within the Incorporated Village in accordance with the parental preferences of the Satmarer. The questions presented follow:

1. Whether a state statute which creates a public school district with boundaries coterminous with an existing governmental unit in order to facilitate access to secular special education programs and services by disabled students sharing a common religious heritage has an impermissible primary

effect of advancing religion in violation of the First Amendment's Establishment Clause, where such state action was designed and intended to address the social, psychological and cultural needs of such students.

2. Whether the primary effect of a state statute creating a separate public school district in order to facilitate access to secular special education programs and services by handicapped students sharing a common religious heritage impermissibly advances or endorses that shared religious heritage in violation of the First Amendment's Establishment Clause where programs and services are provided directly to the students within the context of a secular public program at a public site utilizing the services of public employees.

LIST OF PARTIES

The parties to the proceeding below, as required by Supreme Court Rules 14.1(b) and 29.1, are as follows:

The parties to the proceeding below were petitioner Board of Education of the Monroe-Woodbury Central School District, the Board of Education of the Kiryas Joel Village School District, and the Attorney General of the State of New York. Petitioner, Board of Education of the Monroe-Woodbury Central School District, a public corporation, has no parent company, subsidiary or affiliate pursuant to Rules 14.1(b) or 29.1.

Respondents below were Louis Grumet and Albert W. Hawk.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

BOARD OF EDUCATION OF
OF THE MONROE-WOODBURY
CENTRAL SCHOOL DISTRICT,

Petitioner,

-against-

LOUIS GRUMET
and ALBERT W. HAWK,

Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

Petitioner Board of Education of the Monroe-Woodbury Central School District respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of New York, entered into the above-entitled proceeding on July 6, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York is not yet officially reported but is reported at 62 U.S.L.W. 2045 and is available through Westlaw at 1993 WL 241389; it is reprinted in the Appendix hereto at 1a.

The Opinion and Order of the Appellate Division, Third Department is reported at 187 A.D.2d 16, 592 N.Y.S.2d 123; it is reprinted in the Appendix hereto at 61a.

The Order and Judgment of the Hon. Lawrence E. Kahn in Supreme Court, Albany County is reported at 151 Misc.2d 60, 579 N.Y.S.2d 1004; it is reprinted in the Appendix hereto at 92a.

Petitioner sought a stay of the judgment of the Court of Appeals from an Associate Justice of that Court pending the filing of a petition to this Court for a writ of certiorari. While the Hon. George Bundy Smith granted a temporary stay, he thereafter vacated the stay by order dated July 19, 1993, which is reprinted in the Appendix at 102a.

In accordance with Rule 23 of the Rules of this Court, petitioner thereafter applied to the Associate Justice of this Court with responsibility for the Second Circuit, the Hon. Clarence Thomas, who signed an order granting a temporary stay but referred the application to the entire Court. By orders dated July 26, 1993, reprinted in the Appendix at 104a, this Court granted a stay of the Judgment of the Court of Appeals "pending the timely filing and disposition by this Court of a petition for a writ of certiorari."

JURISDICTION

This Court has jurisdiction to review the Opinion and Judgment of the Court of Appeals of the State of New York pursuant to the Title 28 U.S.C. § 1257, which authorizes review by certiorari of final judgments rendered by the highest court of a state, where the validity of a state statute is in question on the ground that it is repugnant to the Constitution of the United States. The Opinion and Judgment of the Court of Appeals of the State of New York which declares Chapter 748 of the 1989 Laws of the State of New York to be repugnant to the First Amendment of the Constitution of the United States, was entered on July 6, 1993.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides, insofar as pertinent, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;".

Chapter 748 of the 1989 Laws of the State of New York creates the Kiryas Joel Village School District; establishes a mechanism for the popular election of a board of education and vests school trustees with the same powers and duties as trustees of other public school districts. The full text of the Chapter is reprinted in the Appendix at 105a.

STATEMENT OF THE CASE

After this Court rendered its decisions in *Aguilar v. Felton*, (473 U.S. 402 [1985]) and *Grand Rapids v. Ball*, (473 U.S. 373 [1985]), petitioner Board of Education of the Monroe-Woodbury Central School District was compelled to reexamine the manner in which it had previously provided special education programs and related services to the Satmar Hasidic handicapped students residing within the incorporated Village of Kiryas Joel, which was then within the boundaries of the Monroe-Woodbury Central School District. Consistent with what it believed to be its obligations under federal and state law, more particularly the Education for the Handicapped Act (E.H.A.), the precursor to the Individuals With Disabilities Education Act (Title 20 U.S.C. § 1400, *et seq.*) and its state counterparts, Article 89 of the Education Law and Education Law, § 3602-c (commonly known as the "dual enrollment statute"), petitioner ceased to offer special education programs and services at an annex adjacent to and educationally identifiable with one of the parochial schools within the Village.

When the parties were unable to agree on an appropriate alternative method of furnishing such services, the Board of Education brought suit in Supreme Court, Orange County for judgment declaring that the State's "dual enrollment" statute compelled it to furnish special education and related services to non-public school students only within the regular classes of the public schools of the District and not otherwise. The Satmarer counterclaimed for a declaration that such services were required to be provided on the premises of the schools which their children customarily attended. In *Board of Education*

of the *Monroe-Woodbury Central School District v. Wieder*, 72 N.Y.2d 174, 531 N.Y.S.2d 889 (1988), the New York State Court of Appeals, relying upon its construction of state law, rejected both positions, concluding instead that the District "...is neither compelled to make services available to the private school handicapped children only in the regular public school classes and programs, nor without authority to provide otherwise" (72 N.Y.2d at p. 187).

While the Court of Appeals' decision may have addressed the legal issues, it did not resolve the underlying dispute between the parties. The District Committee on Special Education, recognizing its authority under the decision of the Court of Appeals to continue to make programmatic decisions on an individual basis under applicable federal and state guidelines including the concept of "least restrictive environment", continued in most instances to recommend public school placements for the handicapped students residing within the Village of Kiryas Joel. The Satmarer, adhering to their prior position, declined to accept such services in the regular classes of the public schools. They pointed to certain prior instances in which Satmar students had accepted programs and services within the context of public placements but indicated that such placements had proved inappropriate because of such nonreligious factors as the impact upon the children of travelling out of the sheltered environment of the Village; the psychological harm of being thrust into a strange environment; the fact that their physical appearance and language difficulties immediately set them apart from other students; and the necessity for bilingual, bicultural programs specially adapted to meet their social, psychological and cultural needs.

Faced with the continued intractability in the positions of the parties and the consequent failure of the Satmarer to participate in public programs and services, the State Legislature took action in order to facilitate access by the handicapped students residing within the Village to those types of special education programs and services which are required by federal and state law to be made available to all handicapped students. The Legislature enacted Chapter 748 of the Laws of 1989 (reprinted in the Appendix at 105a) which created the Kiryas Joel Village School District with boundaries coterminous with the existing Incorporated Village of Kiryas Joel. The legislation provided that the school district shall be governed by a board of trustees elected by the qualified voters of the Village, which board shall have the same powers and duties as trustees of union free school districts (Education Law, Article 35). The Sponsor's memo in support of the legislation (reprinted in the Appendix at 106a), the Governor's Memorandum approving the Chapter (reprinted in the Appendix at 108a), and the legislative history of the bill clearly indicate that the Kiryas Joel Village School District was created but for a single purpose, *i.e.* to provide special education and related services to the handicapped students residing within the Village and not to operate a traditional elementary or secondary education program for resident non-handicapped students. Non-handicapped students continue to attend the parochial schools of the Village in accordance with the educational preference of the Satmarer for parochial education for their children.

The Kiryas Joel Village School constitutes a unique, wholly-secular presence within the Incor-

porated Village. While the Incorporated Village is composed almost entirely of members of the Satmar Hasidic community, the School itself is staffed on a non-denominational basis, and some students tuitioned to the School by other public school districts are not Satmarer. Governance of the school district is separate and distinct from the religious leadership within the Village.

As is more fully reflected in the affidavit of Philip R. Paterno (which is reprinted in the Appendix at 110a) and the affidavit of Steven M. Bernardo (which is reprinted in the Appendix at 114a), the Village School is physically separate and apart from and is not proximate to or educationally identifiable with the religious schools within the community. It is secular in appearance, devoid of even the customary mezuzahs on the doorposts. The School is taught by an instructional staff certified by the Commissioner of Education of the State of New York, who are assisted by non-instructional staff selected in accordance with applicable civil service rules and regulations. The School follows a secular academic calendar. While strict separation of male and female students is practiced within the surrounding community, boys and girls are instructed jointly at the School. Furthermore, the curriculum is secular and is not influenced or dictated by the sex of the student, as would be the practice in the religious schools within the Village. Female teachers instruct male students. This, too, would not occur in the religious schools. In addition, English is the primary language of instruction, although the school offers bilingual and bicultural secular special educational programs. This, too, should be contrasted with the surrounding community, in which Yiddish is the primary language of

communication and instruction. Thus, the public school district offers programs and services which in many significant respects are at odds with the basic precepts of Satmar Hasidim.

The federal question sought to be raised herein was initially raised in the Complaint filed in Supreme Court, Albany County. The first cause of action states as follows:

79. Upon information and belief, by its enactment of the contested litigation, the State has accommodated and is accommodating the religious beliefs of a particular religious sect. The creation of a school district that will service only children within the Satmar Hasidic Village of Kiryas Joel furthers the Hasidim's centrally held religious belief of insulating the children of the Village from the larger, diverse outside society. The bill therefore has as its purpose, and/or will have as its primary effect, the promotion of religion in violation of the Establishment Clause of the First Amendment. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).
80. Upon information and belief, the bill will also violate the Establishment Clause by causing those state officials and agents charged with the duty of monitoring the newly created school district, to become excessively entangled in matters of religion. (See *Lemon, supra*).

81. Upon information and belief, since the contested legislation establishing a separate school district for Kiryas Joel follows the Court of Appeals' decision in *Wieder, supra*, which held that the state was not constitutionally mandated to provide remedial education to handicapped Hasidic children in the parochial school they usually attend; and the U.S. Supreme Court decisions in *Grand Rapids* and *Aguilar*, which held that public school teachers could not constitutionally provide educational services on the premises of parochial schools, the unconstitutional intent of the legislation is apparent. (Record on Appeal to the Court of Appeals; pp. 62-64.)

Justice Lawrence E. Kahn in Supreme Court, Albany County held that the challenged statute "was enacted to meet exclusive religious needs and has the effect of advancing, protecting and fostering the religious beliefs of the inhabitants of the school district." Justice Kahn's decision is reported at 151 Misc. 2d 60 and is reprinted in the Appendix at 92a.

The Appellate Division, Third Judicial Department concurred that the principal or primary effect of the Chapter was to advance religion in violation of the First Amendment's Establishment Clause. Its decision is reported at 187 A.D.2d 16 and is reprinted in the Appendix at 61a.

A sharply divided Court of Appeals affirmed the decision of the Appellate Division, Third Department that the creation of a separate school district

violated the Establishment Clause of the First Amendment of the Federal Constitution. The Court specifically modified the decision of the Appellate Division, Third Department to reserve judgment explicitly on the State constitutional issue by deleting a separate finding that the Chapter had also violated Article 11, Section 3 of the Constitution of the State of New York and limited its holding to a declaration that the Chapter was violative of the second prong of the *Lemon* test (*Lemon v. Kurtzman*, 403 U.S. 602 [1971]) in that the principal or primary effect of the legislation advanced the religious principles of the Satmarer by conveying a message of governmental approval or endorsement for the separationist tenets of the religious community. The majority opinion, separate concurring opinions and dissent are reprinted in the Appendix at 1a.

REASONS FOR GRANTING THE WRIT

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The holding of the Court of Appeals that the creation of a secular Kiryas Joel Village School District to meet the special education needs of handicapped students residing within the Incorporated Village creates an impermissible symbolic union of church and state conflicts with prior decisions of this Court under the First Amendment's Establishment Clause and presents important recurring questions of constitutional law which should be addressed by this Court.

The creation of a secular public school district with boundaries coterminous with an existing governmental unit for the purpose of furnishing secular special education programs and services to its residents does not have a principal or primary effect which advances religion in violation of the First Amendment to the United States Constitution.

The Court of Appeals of the State of New York has held that the legislation creating the Kiryas Joel Village School District will itself be perceived by the "objective observer" to represent an "impermissible symbolic union of church and state and as an endorsement of the religious choices of the Satmarer". Thus, the manner in which the School actually functions is deemed by such Court to be irrelevant to the facial constitutionality of the statute. We believe that this approach is erroneous in that the Court should have considered the manner in which the statute has been implemented (*Wallace v. Jaffree*, 472 U.S. 38 [1985]). The Court below held that because ". . . the principal or primary effect of Chapter 748 of the Laws of 1989 is to advance religious belief", the Chapter is repugnant to the Establishment Clause and consequently is unenforceable. The practical effect of such a decision is to exalt form over substance by failing to take cognizance of the fact that the School actually functions as a wholly-secular public school district which is separate and apart from and not subordinate to the direction and control of the religious institutions within the surrounding community.

We believe that the Court below has misconstrued and misapplied the decisions of this Court, and that the conclusion which it drew is at variance

therewith. It is uncertain whether the three-pronged test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) represents the current view of a majority of the Justices of this Court with respect to the analytic framework for determining the permissibility of governmental action under the First Amendment's Establishment Clause. The concurring opinion of Justice Scalia in *Lamb's Chapel, et al. v. Center Moriches U.F.S.D.*, ___ U.S. ___, 113 S.Ct. 2141, 2150 (1993), suggests that a majority of the Justices through their various opinions and concurrences have "... driven pencils through the creature's heart", but the validity of this premise is as yet untested. The significant failure of the Court in *Lee v. Weisman*, 505 U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (involving inclusion of invocations and benedictions in public school graduation ceremonies) and thereafter in last Term's decision in *Zobrest v. Catalina Foothills School District*, ___ U.S. ___, 113 S.Ct. 2462 (1993) (involving entitlement of a parochial school student to the services of a sign language interpreter funded under the I.D.E.A. at a parochial school) to apply the *Lemon* analysis lends credence to the suggestion that *Lemon* may no longer be viable and that this Court may wish to review its Establishment Clause jurisprudence to articulate principles of sufficient clarity and general applicability to serve as a guide to subordinate federal and state courts in resolving First Amendment controversies arising under the Establishment Clause.

Even if *Lemon* continues to be viable, we nevertheless respectfully suggest that application of the various elements of the test necessarily supports the constitutionality of the disputed statute. It cannot be gainsaid but that even individuals having deep

personal religious convictions may also have legitimate secular concerns, primary amongst which may be their desire to have their children appropriately educated, and that the state may legitimately address such concerns provided that it does so in a manner which does not directly aid or subsidize a religious institution. This Court has on numerous prior occasions sustained the validity under the second prong of *Lemon* of governmental programs which are "wholly neutral in offering educational assistance to a class defined without reference to religion" (concurring opinion of Justice Powell in *Witters v. Washington Department of Services for the Blind*, 474 U.S. at 490, 491 [1986]); *Mueller v. Allen*, 463 U.S. 388 (1983); *Zobrest*, *supra*. The statute creating the Kiryas Joel School District is such a program, because it offers secular educational services in a secular milieu to all district residents, without regard to religious or non-religious preferences of the parents and because such programs directly benefit the students themselves and not their religious faith.

All handicapped students are entitled by federal and state law to access to programs and services appropriate to meet their special education needs (Title 20 U.S.C. § 1400 *et seq.*; Education Law, Article 89). The Individuals With Disabilities Education Act (I.D.E.A.) specifically mandates inclusion of private (including parochial) school students within the programs and services of the Act (Title 20 U.S.C. § 1413[a][4][A]; Title 34 C.F.R. §§ 300.341[b]; 300.349; 300.400-300.452. In *Zobrest*, *supra*, this Court rejected the argument that a statute which facilitated access by a parochial school student to the services of an I.D.E.A.-funded sign language interpreter on the premises of a parochial school advanced the religion

of such student in violation of the First Amendment. This Court in *Zobrest, supra*, held that the federal statute created no financial incentive for a parent to choose a sectarian school, nor did any public moneys find their way into the coffers of the religious institution itself. The only benefit which the school received was indirect and attenuated. In addition, the religious school was not relieved of any costs it would otherwise have been compelled to bear in educating its students as a result of implementation by the public school of its mandate under the I.D.E.A. to include students without regard to the "religious-nonreligious" nature of the schools which such children attended in programs and services under the Act. (*cf. Grand Rapids v. Ball*, 473 U.S. 373, 397 [1985]).

The key issue before this Court is whether provision of wholly-secular educational services at a public site by public employees to handicapped children sharing a common religious heritage has the primary effect of advancing the religious precepts of such students. We respectfully submit that it does not. Initially, it must be emphasized that unlike the parochial school involved in *Zobrest, supra*, the Kiryas Joel Village School District is a public school in all respects (*cf. Bowen, Secretary of Health and Human Services v. Kendrick*, 487 U.S. 589 [1988]). The secular nature of the facility is reflected in the affidavits of Philip R. Paterno (reprinted at Appendix 110a) and Steven M. Bernardo (reprinted at Appendix 114a). While all students in attendance at the School may share a common religious heritage (although in fact some tuition students sent to the District's unique bilingual and bicultural special education programs by other public school districts are

not Satmar Hasids), this Court has held that this factor in and of itself will not serve to invalidate a program which furnishes secular education programs and services provided by public employees at a public site (*Wolman v. Walter*, 433 U.S. 229 [1977]; *See also, Pulido v. Cavazos*, 934 F.2d 912 [8th Cir. 1991]; *Walker v. San Francisco Unified School District, et al.*, 761 F.Supp. 1463 [N.D. Cal. 1991]).

The Kiryas Joel Village School does not advance the religious beliefs of the Satmarer in other than a remote or incidental manner. Secularism is the *quid pro quo* for services within the School, yet secularism, as the dissenting Justice in the Court of Appeals perceptively noted, is "antithetical to Hasidism". The programs and services offered by the District are furnished in a manner inconsistent with many basic religious precepts of the Satmarer. The State Legislature with a clearly defined nonreligious intent and purpose chose to accommodate the social, psychological and cultural needs of the handicapped students in order to facilitate their access to programs and services; the resulting benefits inure directly to the students themselves and not to their shared religious faith.

No public funds have been diverted to the parochial schools of the Village or to the religious institutions therein, nor have the parochial schools been relieved of any significant burden which they would otherwise be compelled to bear. If the Kiryas Joel Village School District ceased to exist, the burden of providing programs and services for the handicapped students residing within the Village would devolve by federal and state law upon petitioner Monroe-Woodbury Central School District, which

would then be required to meet such needs directly if the parents chose to enroll their students in the public schools or to otherwise furnish programs and services under the I.D.E.A. and the State's "dual enrollment" Law to handicapped students attending parochial schools within the Village. If there were no Village School District, the parochial schools within the Village would still not be compelled to bear the cost of furnishing a secular education to resident handicapped students, because the underlying legal responsibility for providing a free appropriate public education remains with the public school district of residence, even in such instances where the parent opts for a parochial school placement for his or her child. Thus, the parochial schools will receive no direct benefit from the Act or indirect subsidy, as might occur where a public school district takes over "a substantial portion of the responsibility of teaching secular subjects". *Grand Rapids*, 473 U.S. at p. 397.

The Act does not advance the religious interests of the Satmarer and does not directly benefit the religious institutions within the community except in an indirect or attenuated manner. The Act has a permissible secular primary effect which is consistent with the second prong of the *Lemon* test.

II.

The Court of Appeals erroneously failed to distinguish between endorsement and mere facilitation of access. Its holding prohibiting creation of a secular public school district is inconsistent with the prior decisions of this Court which hold that a public body may provide separate educational services to parochial school students at a public site without violating the First Amendment's Establishment Clause.

The Court below found that the "symbolic union of church and state effected by the Kiryas Joel Village School District under Chapter 748 of the Laws of 1989 is sufficiently likely to be perceived by the Satmarer as an endorsement of their religious choices, or by nonadherents as a disapproval of their individual religious choices". We disagree. The "objective observer" test, having its genesis in the concurring opinion of Justice O'Connor in *Wallace v. Jaffree*, 472 U.S. 38 (1985), is at best an imprecise and variable analytic tool, because the measurement of perceptions by definition often proves illusory or self-fulfilling. Just as beauty is frequently in the eye of the beholder, the "objective observer" nuance, as it was characterized by the State Court of Appeals, frequently serves but to confirm the pre-existing prejudices of the observer. Similarly, the concept of "endorsement" is equally ephemeral and incapable of providing an objective framework for analysis by subordinate courts.

We believe that the Court of Appeals has misconstrued this Court's holdings in the "access" cases and has erroneously perceived the mere neutral secular act of accommodation as an endorsement of the resultant activities. In *Widmar v. Vincent*, 454 U.S. 263 (1981) and thereafter in *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), this Court sustained the constitutionality of governmental actions which facilitated equal access to public facilities for religious speech-related activities. In *Widmar*, *supra*, this Court held that where a university had customarily made its facilities available for general use by the public-at-large, it could not selectively exclude a user on the basis of the proposed religious content of the contemplated use. Similarly, in *Mergens*, *supra*, this Court, applying the federal Equal Access Act (98 Stat. 1302, 20 U.S.C. §§ 4071-4074), extended the *Widmar* holding to assure equal access for religious speech activities by secondary school students, where the school had previously made its property available for non-curriculum related activities. In *Mergens*, this Court noted that high school students would not be likely to "confuse an equal access policy with state sponsorship of religion". 496 U.S. 226 at p. 250. This Court's very recent decision last Term in *Lamb's Chapel*, ___ U.S. ___, 113 S.Ct. 2141 (1993), further reflects the proposition that the neutral act of facilitation of access does not necessarily equate to endorsement of resultant activities. In *Lamb's Chapel*, *supra*, this Court found "no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental".

The State Legislature has created a Kiryas Joel Village School District for the express purpose of facilitating access by handicapped students to secular programs and services from which they would otherwise forebear if offered solely within the context of public school placements within the Monroe-Woodbury Central School District. The Legislature has accommodated this reality by creating a school district to offer secular programs and services separate and apart from the religious influences in the underlying community. Under such circumstances, we respectfully submit that the "objective observer", having knowledge of "the text, legislative history and implementation of statute" (*Wallace*, 472 U.S. at p. 76) and being aware that facilitation of access does not necessarily equate to endorsement, would reasonably conclude that no message of endorsement for Satmarer theology, or more particularly for its separationist tenets, could fairly be drawn from the creation of a secular public school district offering programs and services in a manner inimical to many of the basic precepts of the Satmarer. Indeed, such observer could not fail to note that the Act was passed by a Legislature devoid of members of the Satmar sect, was approved by a Governor of a different faith, and was supported by public officials of different faiths and by a wide variety of non-Satmar public institutions. It strains credibility to suggest the "nonadherents" who lent such widespread support for the Chapter perceived that enactment of the law would constitute a disapproval of their own religious choices. The Record below clearly does not support such a contention.

In *Wolman v. Walter*, 433 U.S. 229 (1977) and its progeny, this Court sustained the constitutionality of provision of certain remedial, therapeutic and guidance services to parochial school students in public centers or in mobile units off the premises of the parochial school. Contrasting provision of instructional services in the so-called "neutral site" from those furnished within the pervasively-sectarian environment of the parochial school, this Court held that the separate provision of instructional services to students sharing a common religious heritage was constitutional as long as they were offered at a religiously-neutral location. This is exactly the rationale for the Kiryas Joel Village School District. The state has in effect created a neutral site for the handicapped students within the Village but has coupled availability of such services with the obligation to conduct such School in a secular manner, as all other public school districts.

This Court has frankly acknowledged that "government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause (*Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-145 [1987]). It is equally settled that "[t]he limits of permissible accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause" (*Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 673 [1970]) and that "the scope of accommodation permissible under the Establishment Clause is larger than the scope of accommodation mandated by the Free Exercise Clause" (*County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, et*

al., 492 U.S. 573, 613 [1989] at Footnote 59). Even were this Court to conclude that the legislation at issue accommodated the religious preferences of the Satmarer in such a manner that it benefited the religious institutions within the community in other than an indirect or attenuated fashion, nevertheless this Court has clearly indicated that "even when the government is not compelled to do so by the Free Exercise Clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion" (*Marsh v. Chambers*, 463 U.S. 783, 812 [1983] [Brennan, J. dissenting]).

In this instance, the State Legislature has chosen to enact legislation which has the practical effect of alleviating a significant burden on the Satmarer's free exercise rights. There can be no doubt but that the loss of secular educational services constitutes a substantial burden to the Satmarer, while the consequences of this legislative solution are minimal to third parties. The compromise structured to facilitate access by the Satmarer to public programs and services does not advance the precepts of their religious faith but rather creates a neutral secular environment for delivery of educational services which by its nature is inherently less threatening to the students than the public schools of the Monroe-Woodbury Central School District. It is thus analogous to the "neutral site" which under this Court's decisions, the Board of Education of the Monroe-Woodbury Central School District was clearly free to establish (*Wolman v. Walter*, 433 U.S. 229 [1977]).

Justice Souter in his concurring opinion in *Lee v. Weisman*, 505 U.S. ___, 112 S. Ct. 2649, 20 L.Ed.2d 467 (1992), speaks eloquently with respect to the

necessity for accommodation as an expression of secular "respect for, but not endorsement of, the fundamental values of others". The "access" cases, including last Term's decision in *Lamb's Chapel, supra*, reinforce the proposition that accommodation prompted by secular respect is permissible and encouraged under the Free Exercise Clause, yet does not offend the Establishment Clause where the programs and services furnished are wholly-secular within a secular environment.

We respectfully submit that the Act creating the Kiryas Joel Village School District represents a constitutional legislative solution to an otherwise intractable dilemma. It has a primary effect of facilitating secular educational opportunities to the handicapped students residing within the Village and an incidental effect of alleviating a substantial burden on their free exercise rights. Thus, the decision of the Court of Appeals of the State of New York has misapplied the appropriate constitutional standard, and its decision should be vacated and set aside.

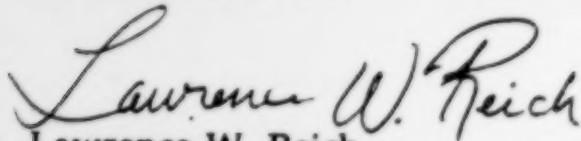
CONCLUSION

For all the foregoing reasons, petitioner respectfully urges that the petition for a writ of certiorari be granted. The decision below is clearly inconsistent with prior decisions of this Court, and the issues are of sufficient public importance and of a recurring nature as to warrant the granting of certiorari.

Dated: Northport, New York
September 30, 1993

Respectfully submitted,

INGERMAN, SMITH, GREENBERG,
GROSS, RICHMOND, HEIDELBERGER,
REICH & SCRICCA

A handwritten signature in cursive script that reads "Lawrence W. Reich". The signature is written in dark ink and is positioned above the printed name of the signatory.

By: Lawrence W. Reich
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APPENDIX A

STATE OF NEW YORK

COURT OF APPEALS

3 No. 120
Louis Grumet, &c., et al.,

Respondents,

OPINION

v.

Board of Education of the Kiryas
Joel Village School District,
et al.,

This opinion is uncorrected and
subject to revision before
publication in the New York Reports

Appellants.

Nathan Lewin, for appellant BOE Kiryas Joel
Village.

Lawrence W. Reich, for appellant BOE
Monroe-Woodbury.

Julie S. Mereson, for Attorney General.

Jay Worona, for respondents.

American Jewish Congress; New York State
United Teachers; Committee for Public Education and
Religious Liberty; and Anti-Defamation League, *amici*
curiae.

SMITH, J.:

Plaintiffs, citizen taxpayers of this State, maintained this action against defendants Board of Education of the Kiryas Joel Village School District and Board of Education of the Monroe-Woodbury Central School District, challenging the enactment of Chapter 748 of the Laws of 1989. That statute established a separate public school district in and for the Satmarer Hasidic Village of Kiryas Joel, Orange County.¹ Plaintiffs alleged that Chapter 748 of the Laws of 1989 violates the establishment clause of the First Amendment of the Federal Constitution. Supreme Court granted plaintiffs' summary judgment motion, concluding *inter alia*, that Chapter 748 of the Laws of 1989 has the effect of advancing the religious beliefs of the Satmarer Hasidim inhabitants of the village of Kiryas Joel. The Appellate Division affirmed, determining that the challenged statute violates the second prong of the test in *Lemon v. Kurtzman*, 403 US 602 (187 AD2d 16).

¹ Chapter 748 of the Laws of 1989, provides, in part:

§1. The territory of the village of Kiryas Joel in the Town of Monroe, Orange county, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law.

§2. Such district shall be under the control of the board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.

Defendants appeal as of right from the order of the Appellate Division which finally determines an action that directly involves the construction of the Federal Constitution (CPLR 5601[b](1)). The issue before us is whether Chapter 748 of the Laws of 1989, entitled "AN ACT to establish a separate school district in and for the village of Kiryas Joel, Orange county", violates the establishment clause of the First Amendment of the Federal Constitution. We now modify the order of the Appellate Division, agreeing that the statute violates the establishment clause of the First Amendment of the Federal Constitution.

I.

The Village of Kiryas Joel was formed by, and is composed almost entirely of members of the Satmarer Hasidic sect. In addition to separation from the outside community, separation of the sexes is observed within the village. Yiddish is the principal language of Kiryas Joel. No television, radio, or English language publications are generally used. There is a male and female dress code. For the most part, the children are educated in religiously affiliated schools. The boys attend the United Talmudic Academy and are educated in the Torah. The girls attend Bais Rochel and are instructed on what they will need to function as adult women (*see, Board of Educ. v. Wieder*, 72 NY2d 174, 179-180). These differences have led to a series of court cases involving the Satmarer Hasidim.²

² (*See, e.g., Parents' Assn v. Quinones*, 803 F2d 1235 [the Second Circuit preliminary enjoined implementation of a plan by the New York City Board of Education to provide federally funded remedial education

Prior to the decision of the United States Supreme Court in *Aguilar v Felton* (473 US 402 [1985]), the handicapped children living in Kiryas Joel received special education services from Monroe-Woodbury Central School District personnel in an annex to one of the Kiryas Joel religious schools. In *Aguilar*, the United States Supreme Court considered whether a program under Title I of the Elementary and Secondary Education Act of 1965 authorizing the use federal funds to pay salaries of public employees who teach in parochial schools violated the Establishment Clause of the First Amendment. Concluding that such a program was unconstitutional, the Court stated: "We have long recognized that underlying the Establishment Clause is 'the objective * * * to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other * * *'
Lemon v Kurtzman, *supra*, at 614 [and] * * * the scope and duration of [the] Title I program would require a permanent and pervasive state presence in the sectarian schools receiving aid" (*id.* at 412-413). In response to the *Aguilar* decision, the Monroe-Woodbury Central School District stopped providing the special education programs at the religious school annex. For some time thereafter, some of

for handicapped girls from Beth Rochel school by closing off nine classrooms of a public school, and dedicating them to the use of the Hasidic girls]; *Bollenbach v Board of Educ.*, 659 F Supp 1450 [The District Court found that the deployment of only male bus drivers to the all-boys United Talmudic Academy had the primary effect of advancing religious beliefs]; *Board of Educ v. Wieder*, 72 NY2d 174 [This Court concluded that Education Law § 3602-c neither compels the Board of Education of the Monroe-Woodbury Central School District to nor prohibits the Board from providing private school handicapped children with special services at the private schools or at a neutral site]).

the handicapped Satmarer Hasidic children attended special education classes held at the Monroe-Woodbury public schools. However, allegedly because of the "panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different from theirs," the parents stopped sending them to programs offered at the public schools (*Board of Educ. v. Wieder*, 72 NY2d at 181, *supra*).

In *Board of Educ. v. Wieder*, *supra*, this Court construed Education Law § 3602-c³ to authorize special education services to private school handicapped children and afford them an option of dual enrollment in public schools. We concluded that section 3602-c neither compels boards of education to make special education services available to private school handicapped children only in regular public school classes and programs, nor renders them powerless to provide otherwise (*id.* at 187).

³ Education Law § 3602-c[2] provides, in part:

Boards of education of all school districts of the state shall furnish services to pupils who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent, guardian or person legally having custody of any such pupil.

Section 3602-c(1)(a) defines "services" as "instruction in the areas of gifted pupils, occupational and vocational education and education for students with handicapping conditions * * *."

Thereafter, the Legislature enacted Chapter 748 of the Laws of 1989, which created a new union free school district, the Kiryas Joel Village School District, in the incorporated village of Kiryas Joel in the town of Monroe, Orange County. The newly established Kiryas Joel Village School District was coterminous with the Satmarer Hasidic community of Kiryas Joel, and was created within the boundaries of the Monroe-Woodbury Central School District. Chapter 748 of the Laws of 1989 also established a board of education, composed of five to nine members elected by the voters of the village, that would serve for a period not to exceed five years. Chapter 748 of the Laws of 1989 represents "an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, whose population are all members of the same religious sect" (Governor's Approval Mem, Bill Jacket, L 1989, ch 748).

Plaintiffs Louis Grumet and Albert Hawk commenced this action individually, as citizen taxpayers, and as Executive Director of the New York State School Boards Association, Inc. and President of the New York State School Boards Association, Inc., respectively, against the New York State Education Department and various State officials, alleging, *inter alia*, that Chapter 748 of the Laws of 1989 violates the establishment clause of the First Amendment of the Federal Constitution. The Board of Education of the Kiryas Joel Village School District and the Board of Education of the Monroe-Woodbury Central School District intervened as defendants. The parties stipulated to a discontinuance of the action as to the State officials, but,

pursuant to Executive Law § 71, the State Attorney General continued to appear in this action in support of the constitutionality of Chapter 748 of the Laws of 1989. Both parties sought summary judgment. On their motion, plaintiffs asserted that Chapter 748 violates the Federal constitutional provisions prescribing separation of church and state. Defendants sought a judgment declaring the facial constitutionality of the statute.

Supreme Court granted plaintiffs' summary judgment motion, concluding that the statute is unconstitutional because it "was enacted to meet exclusive religious needs and has the effect of advancing, protecting and fostering the religious beliefs of the inhabitants of the school district[, and] * * * fosters excessive entanglements with religion" (*Grumet v Board of Educ. of the Kiryas Joel Vil. School Dist.*, Sup Ct, Albany County, January 22, 1992, Kahn, J. Index No. 1054-90). The Appellate Division affirmed, concluding that Chapter 748 of the laws of 1989 "authorizes a religious community to dictate where secular public educational services shall be provided to the children of the community [and] * * * creates the type of symbolic impact that is impermissible under the second prong of the *Lemon* test" (187 AD2d 16, 22).

The prior courts concluded that plaintiffs fulfill the requirement for citizen-taxpayer status contained in State Finance Law § 123-a and, therefore, have standing to maintain this action. That conclusion is not contested on this appeal.

II.

Before this Court, defendants maintain that, based on *Lemon v Kurtzman*, *supra*, Chapter 748 is constitutionally valid on its face.

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion" (US Const 1st Amend). The First Amendment is made applicable to the states by the Fourteenth Amendment (*see, Everson v Board of Educ.*, 330 US 1; *Murdock v Pennsylvania*, 319 US 105). It is said that the Establishment Clause of the First Amendment means at least that "[n]either a state nor the Federal Government * * * can pass laws which aid one religion, aid all religions, or prefer one religion over another" (*Everson*, 330 US 1, 15, *supra*). As such, Federal and State governments "must maintain a course of neutrality among religions, and between religion and non-religion" (*Grand Rapids School Dist. v Ball*, 473 US 373, 382).

In *Lemon v Kurtzman*, *supra*, the United States Supreme Court articulated a three-part test for evaluating the constitutionality of governmental actions under the Establishment Clause. The Court stated:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular

legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v Allen*, 392 US 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion * * *" *Walz v Tax Commission*, 397 US 664, 674] (*id.* at 612-613).

The United States Supreme Court has "particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children" (*Grand Rapids School Dist. v Ball*, 473 US 373, 383, *supra*). Recently, the Court adhered to the *Lemon* test in *Lamb's Chapel v Center Moriches Union Free School Dist.*, ___ US ___, 61 USLW 4549). Moreover, the Court has applied *Lemon* in considering whether prior courts were correct in concluding, on a motion for summary judgment, whether a statute was unconstitutional on its face (*see, Bowen v Kendrick*, 487 US 589, 602). Likewise, we have applied the *Lemon* test to statutes or regulations relating to the education of children, where such statutes or regulations are challenged as violating the Establishment Clause (*see, New York State School Bds. Assn v Sobol*, 79 NY2d 333; *Matter of Klein [Harnett]*, 78 NY2d 662). Thus, we apply the *Lemon* test to examine whether the prior courts were correct in concluding that Chapter 748 of the Laws of 1989 is unconstitutional on its face.

III.

While both parties have briefed the first prong of the *Lemon* test, and the Supreme Court found a violation of that prong, the Appellate Division relied exclusively on the second prong and found it violated by the statute here. Because we conclude that the second prong of *Lemon* has been clearly violated, we do not address the first prong.

As stated, the second prong of *Lemon* requires that the principal or primary effect of legislation be one that neither advances nor inhibits religion. Thus, we consider whether the principal or primary effect of the challenged statute advances or inhibits religion. It is clear that the prohibition against state involvement in religion is not limited to direct and funded efforts to indoctrinate citizens in specific religious beliefs but includes a close identification of the responsibilities of government and religion (*see, Grand Rapids School Dist. v Ball*, 473 US 373, 389). In that case, the Supreme Court stated the following:

Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any - or all -- religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a

message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated (*id.*).

In considering whether the principal or primary effect of the challenged statute advances or inhibits religion, the concern is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denomination as an endorsement, and by nonadherents as a disapproval, of their individual religious choices" (*id.* at 390). An inquiry into this kind of effect "must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years [since t]he symbolism of a union between church and state is most likely to influence children of tender years" (*id.*). Context determines whether a particular governmental action is likely to be perceived as an endorsement of religion (*see, Allegheny County v Greater Pittsburgh Am. Civ. Liberties Union*, 492 US 573, 595-597, *supra*). Governmental action "endorses" religion if it favors, prefers, or promotes it (*see, Edwards v Aguillard*, 482 US 578, 593, *supra*; *Wallace v Jaffree*, 472 US 38, 59-60, *supra*, *Lynch v Donnelly*, 465 US 668, 691, *supra*).

Defendants assert that "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the [challenged] statute would perceive it as [the State's endorsement of the Satmarer Hasidic faith]" (*Wallace v Jaffree*, 472 US 38, 76, *supra* [O'Connor, J., concurring]). However, as the dissent acknowledges, "the Supreme Court has not adopted Justice

O'Connor's [objective observer] nuance for detecting an [impermissible] endorsement" of religion by the State (dissent, at p. 11). We agree with the majority of the Appellate Division that the statute not only authorizes a religious community to dictate where secular public educational services shall be provided to the children of the community, but also "creates the type of symbolic impact that is impermissible under the second prong of the *Lemon* test" (187 AD2d, at 22, *supra*).

Chapter 748 of the Laws of 1989 created a new union free school district, the Kiryas Joel Village School District, coterminous with the incorporated village of Kiryas Joel in the town of Monroe, Orange County. This new school district was created within the Monroe-Woodbury Central School District. The statute also established a board of education, composed of five to nine members elected by the voters of the village, that would serve for a period not to exceed five years. The residents of the village of Kiryas Joel are almost exclusively of the Satmarer Hasidic religious sect. Thus, only Hasidic children will attend the public schools in the newly established school district, and only members of the Hasidic sect will likely serve on the school board. We conclude that this symbolic union of church and state effected by the establishment of the Kiryas Joel village school district under Chapter 748 of the Laws of 1989 is sufficiently likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval, of their individual religious choices. Thus, the principal or primary effect of Chapter 748 of the Laws of 1989 is to advance religious beliefs.

The dissent's attempt to analogize this case to the recent Supreme Court case of *Zobrest v Catalina Foothills School Dist*, ____ US ____, 61 USLW 4641, *supra*, is unavailing. In *Zobrest*, the petitioners, a deaf child and his parents, commenced the action challenging the school district's refusal to provide a sign language interpreter to accompany the child to classes at a Roman Catholic high school. The petitioners alleged that the Individuals with Disabilities Education Act (IDEA) and the free exercise clause of the First Amendment to the Federal Constitution required the school district to provide the interpreter, and that the establishment clause did not bar such relief. Concluding that the establishment clause did not bar religious groups from receiving general, "neutral" governmental benefits such as a sign language interpreter, the Supreme Court held:

The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "handicapped" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state

decisionmaking * * *. When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion," * * * it follows under prior decisions that provision of that service does not offend the Establishment Clause (slip opn, at 7-8).

We disagree with the dissent's assertion that "no message of endorsement for Satmar theology or its particular separatist tenets * * * can fairly be inferred" (dissent, at p. 13) from a statute that creates a new school district within an existing school district and establishes a board of education, composed entirely of residents of the village of Kiryas Joel who are almost exclusively of the Satmarer Hasidic religious sect. Here, unlike in *Zobrest, supra*, the statute creating a school district and establishing a board of education coterminous with the Satmarer Hasidic village of Kiryas Joel cannot be viewed as part of a general government program. Rather, as stated, the statute represents an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, whose population are all members of the same religious sect. Thus, it cannot be said that by the creation of the Kiryas Joel Village School District, the government is offering "a neutral service * * * as part of a general program that 'is in no way skewed towards religion.'"

The United States Supreme Court case of *Wolman v Walter* (433 US 229) is inapposite. There the Court held that "considerations of safety, distance and the adequacy of accommodations" could justify a public school's provision of

remedial services in mobile units located on neutral sites near nonpublic school premises (*see, Wolman v Walter*, 433 US, at 247, n 14, *supra*). Contrary to the assertion by the dissent, the legislation at issue in this case does not effect a "unit on a neutral site" serving only sectarian pupils (*see, dissent*, at p. 15). Rather, the statute creates an entirely new school district coterminous with the Satmarer Hasidic community of Kiryas Joel and establishes a school board composed of members elected by the voters of the village. This goes beyond any directive by the Supreme Court or this Court for the provision of special services to handicapped children at a neutral site (*see, Wolman v Walter*, 433 US 229, 248, *supra*; *Board of Educ v Wieder*, 72 NY2d 174, 188, *supra*).

Because special services are already available to the handicapped children of Kiryas Joel, the primary effect of Chapter 748 is not to provide those services, but to yield to the demands of a religious community whose separatist tenets create a tension between the needs of its handicapped children and the need to adhere to certain religious practices. Regardless of any beneficent purpose behind the legislation, the primary effect of such an extensive effort to accommodate the desire to insulate the Satmarer Hasidic students inescapably conveys a message of governmental endorsement of religion. Thus a "core purpose of the Establishment Clause is violated" (*see, Grand Rapids School Dist. v Ball*, 473 US 373, 389, *supra*).

Our conclusion does not, as the dissent declares, "drap[e] a drastic, new disability over the shoulders of young pupils solely on account of the religious beliefs of their

community," nor does it "penalize and encumber religious uniqueness" (*see*, dissent, at 20-21). Special services are made available to the Satmarer student within the Monroe-Woodbury school district. Our decision does not impose any additional burdens on the students within Kiryas Joel; it simply determines that the legislature may not treat the Satmarer community as separate, distinct and entitled to special accommodation.

IV.

The Supreme Court has noted that "[i]f a statute violates any of [the three *Lemon*] principles, it must be struck down under the Establishment Clause" (*Stone v Graham*, 449 US 39, 40-41). Thus, our conclusion that Chapter 748 of the Laws of 1989 violates the second principle of *Lemon* makes it unnecessary for us to comment on whether the statute violates the first and third principles or to address appellants remaining contentions.

Without any separate analysis, the trial court declared the statute unconstitutional under article XI, section 3 of the State Constitution, suggesting that the provision is a "counterpart" to the Establishment Clause. The Appellate Division affirmed on both State and Federal Constitutional grounds, although its discussion, like the trial court's, was limited to the Establishment Clause. Moreover, in this Court the First Amendment is the subject of the parties' focus. In these circumstances, we do not reach the State constitutional issue, which is based on a provision significantly different from the Establishment Clause, both in text and history (*see*,

Judd v Board of Educ., 278 NY 200) and we modify the Appellate Division order accordingly.

Accordingly, the order of the Appellate Division should be modified, with costs to plaintiffs, in accordance with the opinion herein and, as so modified, affirmed.

Grumet v Kiryas Joel

No. 120

KAYE, CHIEF JUDGE (concurring):

Applying the three-pronged *Lemon v Kurtzman* (403 US 602) test, the Court concludes that creation of the Kiryas Joel Village School District violates the Establishment Clause. While I agree that the Laws of 1989, chapter 748 breaches *Lemon's* second prong, and thus join the Court's Opinion, I do not believe that *Lemon* supplies the preferred analytical framework for this case. Rather, in my view, legislation that singles out a particular religious group for special benefits or burdens should be evaluated under a strict scrutiny test, requiring that the law be closely fitted to a compelling State interest.

The law at issue is precisely the sort of legislation that should be strictly scrutinized, because it provides a particular religious sect with an extraordinary benefit: its own public school system. Although I am willing to assume that the law is addressed to a compelling governmental interest--providing special education and related services to disabled children who would otherwise go without such assistance--the law is

not closely fitted to that purpose, as far more moderate measures were available to satisfy that purpose. Accordingly, irrespective of the *Lemon* test,¹ I believe the law violates the Establishment Clause.

I.

My analysis begins with the recognition that, factually, this case is unlike prior Supreme Court cases involving the relationship between religion and education. Prior cases generally fall into two broad categories: public aid to parochial schools or students,² and religious

¹ The *Lemon* test has been criticized by many of the Supreme Court Justices in their individual opinions (see, *Lamb's Chapel v Center Moriches Union Free School Dist.*, ____ US ____, 61 USLW 4549, 4553 [Scalia, J., concurring] [collecting cases]). Indeed, the test was not even invoked by the majority in *Zobrest v Catalina Foothills School Dist.* (____ US ____, 61 USLW 4641), the Court's most recent Establishment Clause case.

² *Zobrest v Catalina Foothills School Dist.* (____ US ____) (sign language interpreter for parochial school student); *Aguilar v Felton* (473 US 402) (public school instructors teaching on premises of parochial schools); *Witters v Washington Dept. of Services for the Blind* (474 US 418) (aid to blind student attending sectarian college); *Grand Rapids School Dist v Ball* (473 US 373) (similar); *New York v Cathedral Academy* (434 US 125) (reimbursement for recordkeeping and testing); *Wolman v Walter* (433 US 229) (textbooks, diagnostic services, remedial education, standardized tests, field trip transportation); *Roemer v Board of Public Works* (426 US 736) (grants to private colleges); *Meek v Pittenger* (421 US 349) (textbooks, instructional materials and various on-site services); *Committee for Public Education v Nyquist* (413 US 756) (funds for maintenance and repair, tuition reimbursement and tax benefits to parents); *Levitt v Committee for Public Education* (413 US 472) (funds for testing); *Hunt v McNair* (413 US 734) (revenue bonds for sectarian-affiliated universities); *Tilton v Richardson* (403 US 672) (federal

activities within public schools ³ (see, *Committee for Public Education v Nyquist*, 413 US 756, 772 [identifying categories]). This case falls into neither category: the law does not provide aid to a parochial school, and it does not prescribe religious practices for a public school.

This case also differs from previous Establishment Clause education cases in a more fundamental respect. Chapter 748 is not one of the myriad "governmental programs that neutrally provide benefits to a broad class of citizens defined without reference to religion" (*Zobrest v Catalina Foothills School Dist.*, ____ US ____, ____, 61 USLW 4641, 4644). Rather, the legislation was specifically designed to benefit Satmar Hasidim, who refuse to send their disabled children to integrated Monroe-Woodbury public

construction grants); *Lemon v Kurtzman* (403 US 602) (teachers' salaries, textbooks, instructional materials); *Earley v DiCenso* (403 US 602) (salary supplements); *Board of Educ. v Allen* (392 US 236) (textbooks); *Everson v Board of Education* (330 US 1) (bus transportation).

³ *Lee v Weisman* (112 S Ct 2649) (prayer at graduation ceremony); *Edwards v Aquillard* (482 US 578) (statute prohibiting teaching of evolution unless accompanied by instruction in theory of "creation science"); *Wallace v Jaffree* (472 US 38) (period of silence for "meditation or voluntary prayer"); *Stone v Graham* (449 US 39) (posting of Ten Commandments); *Abington School Dist v Schempp* (374 US 203) (prayer and Bible reading at beginning of each school day); *Engel v Vitale* (370 US 421) (prayer); *Epperson v Arkansas* (394 US 97) (statute barring theory of evolution); *Illinois ex rel. McCollum v Board of Educ.* (333 US 203) (religious instruction by sectarian teachers); see also, *Lamb's Chapel v Center Moriches Union Free School Dist.* (____ US ____, 61 USLW 4549) (use of school premises by religious group); *Board of Educ. v Mergens* (496 US 226) (same); *Widmar v Vincent* (454 US 263) (same); *Zorach v Clauson* (343 US 306) (students released from public school classes for religious instruction).

schools. That the law is not part of a neutral, generally applicable program of state aid but instead was intended to benefit one religious group distinguishes this case, and calls for a different analysis.

The Religion Clauses of the First Amendment protect fundamental liberties and therefore apply to the States through Fourteenth Amendment's Due Process Clause (*Cantwell v Connecticut*, 310 US 296, 303). Although the Equal Protection Clause of the Fourteenth Amendment has been a bulwark against arbitrary government distinctions based on race (*Loving v Virginia*, 388 US 1, 11), gender (*Craig v Boren*, 429 US 190, 197-199), national origin (*Hernandez v Texas*, 347 US 475, 479), alienage (*Graham v Richardson*, 403 US 365, 371-372) and illegitimacy (*Trimble v Gordon*, 430 US 762, 766), it has not been necessary to identify religion as a suspect classification for equal protection purposes; classifications along religious lines are strictly scrutinized in any event. "Just as we subject to the most exacting scrutiny laws that make classifications based on race, * * * or on the content of speech, * * * so too we strictly scrutinize governmental classifications based on religion" (*Employment Div., Dept of Human Resources of Oregon v Smith*, 494 US 872, 886 n2 [citations omitted]; see, 3 Rotunda and Nowak, *Treatise on Constitutional Law* § 18.40, at 491-494 [2d ed. 1992]).

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." (*Larson v Valente*, 456 US 228, 244.) It is thus axiomatic that the government "must maintain a course of neutrality among religions" (*Grand Rapids School Dist. v Ball*, 473 US 373, 382; see also, *Epperson v Arkansas*, 393 US 97, 104 ["The First

Amendment mandates government neutrality between religion and religion"]; *Zorach v Clauson*, 343 US 306, 314 ["government must be neutral when it comes to competition between sects]).

The State is in the greatest danger of straying from its required course of neutrality when it selects a particular religious sect for special privileges or burdens. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders" (*Church of the Lukumi Babalu Aye v City of Hialeah*, ____ US ____, ____, 61 USLW 4587, 4591, quoting *Walz v Tax Commission*, 397 US at 696 [Harlan, J., concurring]). Laws intentionally designed to hamper a group's religious practices violate the Free Exercise Clause unless they are narrowly tailored to a compelling government interest (*see, Church of the Lukumi Babalu Aye*, ____ US at ____, 61 USLW at 4594). By the same token, a law affording a benefit to one religious group violates the Establishment Clause if it too is not narrowly tailored to a compelling government interest.⁴

Larson v Valente (456 US 228) is a recent application of strict scrutiny to strike down a law under the Establishment Clause. In that case, a Minnesota statute

⁴ A "benefit" addressed to one religious group may be related to Free Exercise values, and thus would not be constitutionally objectionable if sufficiently tailored. For example, a state may choose to exempt from criminal drug laws the possession of peyote by those whose religious beliefs mandate sacramental use of that drug (*see, Employment Div., Oregon Dept. of Human Resources v Smith*, 494 US at 890). But if the exemption is too broad — permitting, for instance, members of the affected religious group to also possess and traffic in heroin and cocaine, that could, in my view, violate the Establishment Clause.

imposed certain reporting requirements on charities but exempted religious organizations receiving more than half their contributions from members. The Court concluded that the *Lemon* test is intended "to apply to laws affording a uniform benefit to *all* religions" (456 US at 252; *see also*, *Corporation of the Presiding Bishop v Amos*, 483 US 327, 339), but that when a law expresses "a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." (456 US at 246; *see also*, *Smith*, 494 US at 886 n2; *County of Allegheny v ACLU*, 492 US 573, 608-609; *Lynch v Donnelly*, 465 US 668, 687 n13.)

The *Larson* Court determined that the distinction between religious groups was a legislatively-sanctioned denominational preference, and thus the law was invalid unless it was justified by a "compelling governmental interest" and was "closely fitted to further that interest" (456 US at 247). The Court assumed that the statute was addressed to a compelling governmental interest—to protect citizens against abusive solicitation practices—but concluded that it was not "closely fitted" to those interests and therefore violated the Establishment Clause (456 US at 248-251).

Larson is of course distinguishable from the present case in that the Minnesota statute discriminated among religions while here the law is aimed simply at one religion. In my view, however, that distinction does not necessarily alter the analysis. A forbidden denominational preference can result from a grant of benefits to one religious group as readily as discrimination among sects. In either case, the specter of official favoritism looms large, and the legislation should be carefully scrutinized.

II.

The creation of the carved-out school district is precisely the type of legislation that should be subjected to strict scrutiny. Although the law does not, on its face, make reference to the Satmar Hasidic sect, "[f]acial neutrality is not determinative" (*Church of the Lukumi Babalu Aye v City of Hialeah*, ____ US at ____, 61 USLW at 4590). No one disputes that purpose of the law was to create a new school district to provide disabled children of the Satmar faith with special education services in a segregated environment. Accordingly, in these circumstances the coterminality of the school district and the Village is of no moment (*see dissent at 7*): the law was "an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, *whose population are all members of the same religious sect.*" (Governor's Mem, 1989 McKinney's Session Laws of NY, at 2429 [emphasis added]). Without doubt, the law was designed to confer a benefit on a particular religious group.

Plainly this special interest legislation cannot be equated with the statutory scheme in *Zobrest v Foothills School Dist.* (____ US ____, 61 USLW 4641) (*see dissent at 10, 12, 16-17*). There, a parochial school student sought a sign language interpreter as "part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends" (____ US at ____, 61 USLW at 4644). Thus, the law was entirely neutral in relation to individual religions. Here, by contrast, the State engaged in *de jure* segregation for the benefit one religious group. Establishment of a public school district intentionally

segregated along religious lines is a classic example of government action that must be "survey[ed] meticulously."

Turning then to the required strict scrutiny, I assume, for sake of analysis, that the "intractable problem" (Governor's Mem approving L 1989, ch 748, 1989 McKinney's Sessions Laws of NY, at 2429) of delivering special education services to Satmar children presented a compelling, secular government interest. Indeed, if protecting citizens against abusive solicitation practices may be considered a compelling (*see, Larson v Valente*, 456 US at 248), surely the provision of special education services qualifies.

Nevertheless, in my view the statute violates the Establishment Clause because the legislative response plainly went further than necessary to resolve the problem. While defendants and the dissent characterize the new school district simply as a "neutral site" for the delivery of special services (*see, Wollman v Walter*, 433 US 229, 248), this legislation, establishing an entirely new and separate school district, is significantly broader. Interestingly, although the dissent stresses that only a facial challenge is presented, it relies on how the statute has been implemented—for example, that the new district presently provides only special education services. On this facial challenge, the Court must consider the full scope of the statute, which creates a new school district vested with "*all the powers and duties of a union free school district*" (L 1989, ch 748, emphasis added).

The impact of the Legislature's remarkable action of carving out a new school district coterminous with a religious enclave must not be assessed in a vacuum but measured against history. For almost 40 years, ever since the

landmark decision in *Brown v Board of Education* (347 US 483), government-sponsored segregation efforts have been unlawful (*see, e.g., United States v Scotland Neck City Board of Educ.*, 407 US 484, 489-490 [carving out new school district from existing one impermissible because it impedes desegregation]; *compare*, Education Law § 2590-b[3][a][iv] ["heterogeneity of pupil population" a criterion in creating local school districts]; *Mississippi Univ. for Women v Hogan*, 458 US 718 [gender-based admissions policy unconstitutional]). Against this historical backdrop, the "symbolic impact" (*Grand Rapids School Dist. v Ball*, 473 US at 390, *supra*) of creating a new school district to serve the needs of a particular religious group cannot be underestimated.

The law's overbreadth, however, goes beyond symbolism. The impasse between Monroe-Woodbury and the Satmarer concerned only special education services for disabled children. Nevertheless, the Legislature responded by creating a new public school district vested with *all* the powers of a union free school district, which are vast.⁵

⁵ "The board of education of a union free school district, in addition to having in all respects the superintendence, management, and control of the educational affairs of the district, is given numerous more specific duties and powers. Thus, it is empowered and duty-bound to adopt bylaws and rules for its government as proper in the discharge of its duties; establish rules and regulations concerning the order and discipline of the schools; provide fuel, furniture, apparatus, and other necessities for the use of the schools; prescribe courses of study; regulate the admission of pupils and their transfer between classes or departments; provide milk, transportation, and medical inspection of schoolchildren; provide home-teaching or special classes for handicapped and delinquent children; provide, maintain, and operate, under prescribed circumstances, cafeteria or restaurant service and other accommodations for teachers and

Thus, for example, there is no legal impediment to the new district's operation of a public school program for non-disabled children if it chose to do so. Manifestly, the delegation of such power to the new district demonstrates that the legislation exceeded the problem that engendered it.

Perhaps the best evidence that the Legislature's resolution was not closely fitted to the problem was the availability of more moderate measures to accomplish its goal (*see, Church of the Lukumi Babalu Aye*, ____ US at ____, 61

other employees, pupils, and the elderly; and prescribe, and, when authorized, furnish, textbooks to be used in the schools. It is also authorized to purchase property and construct school buildings and facilities thereon; take and hold possession of school property; lease premises, and lease-purchase instructional equipment, for school purposes; sell and exchange school property; insure school property; sue to recover damages, and offer monetary rewards for information leading to the arrest and conviction of persons, for vandalism of such property; provide, where authorized, for lighting, janitorial care, and supervision of highway underpasses; alter former schoolhouses for use as public libraries; and explore, develop, and produce natural gas for district purposes. It is authorized to appoint teachers and librarians and to raise by tax on the property of the district any moneys required to pay the salaries of teachers employed, and also to appoint committees to visit schools and departments under its supervision and report on their condition. Likewise the board is empowered to discharge district debts or other obligations. It has prescribed powers and duties with respect to self-insurance by the district, accident insurance of pupils, insurance against personal injuries incurred by school volunteers, and group insurance and workers' compensation coverage of teachers and other employees, and may, when authorized, withhold from employees' salaries sums to be paid to specified credit unions. Finally, the board possesses all the powers, and is subject to all the duties, of trustees of common school districts, and has all the immunities and privileges enjoyed by the trustees of academies in this state." (94 NY Jur 2d, *Schools, Universities, and Colleges*, § 99, at 152-157 [1991] [citations omitted].)

USLW at 4592). Accepting the parents' stated reasons for not sending their children to the public schools--psychological harm to the children from being thrust into a strange environment-- then presumably the parents would be satisfied with a program directed to mitigating that trauma, without necessarily segregating the children.

Even if some sort of separate educational services were the only viable alternative, that could have been achieved without carving out a whole new school district. The Legislature could have, for example, enacted a law providing that the Monroe-Woodbury School District should furnish special education services to these children at sites not physically or educationally associated with their parochial schools. That would have satisfied the parents, and would supersede any residual claim by the District that New York statutory law precludes that action.

Such narrowly-tailored legislation would not, in my view, offend the Establishment Clause. In *Wollman v Walter* (433 US 229, 248), the Supreme Court held that "providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion." The Court had struck down previous efforts to provide remedial services on the premises of parochial schools (see, *Meek v Pittenger*, 421 US 349, 367-372), but as the Court explained in *Wollman*, the "dangers in *Meek* arose from the nature of the institution, not from the nature of the pupils" (*Wollman v Walter*, 433 US at 247-248; see also, *Grand Rapids School Dist. v Ball*, 473 US 373, 386-389; *Aguilar v Felton*, 473 US 402, 412). In the present circumstances, a law providing special education services to Satmar children at neutral sites can be considered

closely fitted to a compelling government interest. Creating a new public school district cannot.

The foregoing analysis is consistent with, and indeed substantially overlaps, *Lemon's* second prong. The government may not make religion relevant to a person's political standing in the community (*Lynch v Donnelly*, 465 US 668, 687 [O'Connor, J., concurring]). If the government's response to a problem affecting a religious group is broader than reasonably necessary, it presents at least the perception of official favoritism or endorsement of that religion, in violation of *Lemon's* second prong (see, *County of Allegheny v American Civil Liberties Union*, 492 US 573, 592-594). By carving out a fully-empowered, whole new school district in these circumstances, the Legislature has also transgressed *Lemon*.

III.

This Court's decision returns the parties to square one. It is ironic that in the wake of the Legislature's creation a new school district for the Satmar, Monroe-Woodbury now argues that the "provision of secular instructional services to students of the same faith at a neutral site is constitutionally permissible." This approach by Monroe-Woodbury could well obviate the need for any further legislative intervention.

Grumet v Kiryas Joel

No. 120

HANCOCK, J. (concurring):

I join in Judge Smith's opinion that Chapter 748 has a primary effect of advancing religion and for that reason violates the Establishment Clause. I agree with the majority that it is, therefore, unnecessary to decide whether Chapter 748 also violates the first or purpose test of *Lemon v Kurtzman* (403 US 602). However, if the Court were addressing that issue, I would hold -- as Supreme Court and, in my view, the Appellate Division majority do -- that the statute also violates the first *Lemon* test (see, *Wallace v Jaffree*, 472 US 38, 56, 64 [Powell, J., concurring], 75

[O'Connor, J., concurring]).¹ As the Appellate Division majority pointed out:

*The challenged statute, therefore, was designed * * * to provide * * * [special education] services within the Village so that the children would remain subject to the language, lifestyle and environment created by the community of Satmarer Hasidim and avoid mixing with children whose language, lifestyle and environment are not the product of that religion. The dissent finds a secular purpose for the statute in that it would provide the handicapped children of the Village with the publicly supported, secular special educational*

¹ That the purpose of Chapter 748 was to obviate religious objections of the Satmarers seems plain from any reasonable analysis of the statute's intent from its wording and the statutory scheme. This is borne out by the legislative history and the record. See, for example, Memorandum to Governor Cuomo from Assemblymen Silver urging approval, stating that the bill provides "a mechanism through which [Satmar] students will not have to sacrifice their religious traditions in order to receive the services which are available to handicapped students through out the state" (emphasis added); approval memorandum of Assembly sponsor Joseph Lentol stating that the "Hasidic jewish community hold[s] firmly to its religious tenets" (emphasis added); affidavit of Professor Israel Rubin (the author of the book "Satmar, An Island In The City" quoted in *Board of Education v Wieder*, 72 NY2d 174, 180) to the effect that "[r]eligion and its preservation in the form interpreted and practiced in Satmarer occupies a central place in virtually all matters of importance", that the Satmar schools " * * * are meant to serve primarily as a bastion against undesirable acculturation", that "[b]asically it is religion which underlies the practice of gender segregation" and the "private schools are, of course, among the places where gender segregation is strictly observed"; excerpts from book the "Extraordinary Groups" by Kephart and Zellner (St. Martin's Press 1991) — e.g., "The ethnocentric attitude that they alone are capable of upholding the Torah solidifies the Hasidic belief that all other groups are inferior" and "The goal of the [Satmar] community is social isolation".

services they need and to which they are entitled, but as previously noted those services were already available to all of the handicapped children of the Monroe-Woodbury District, including the handicapped children of the Village. Thus, *the only secular need for the statute recognized by the dissent did not, in fact, exist (Grumet v Board of Education, 187 AD2d 16, 21 [emphasis added])*.

Chapter 748 creates a special union free school district solely for the Village of Kiryas Joel so that its residents, almost all of whom are of the Satmarer Hasidic faith, may receive separate educational services for their handicapped children at public expense in place of the services which are already available to them as residents of the Monroe-Woodbury School District. Obviously, the purpose of Chapter 748 could not have been to meet the need of the residents of Kiryas Joel for special education services; such services were already available to them under State law as to all other residents of the Monroe-Woodbury School District. What is involved here is a special act of legislative and executive grace which makes available to the Kiryas Joel residents public education services to which they *would not otherwise be entitled (contrast, Zobrest v Catalina Foothills School District, ___ US ___, ___ SCt ___, 1993 WL 209636 [where any child qualifying under a general government program for deaf children was entitled to benefits as a matter of right "without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends" (id., 1993 WL 209636, at p 5)])*. In sum, Chapter 748 was enacted solely as an accomodation, not as the fulfillment of an entitlement.

Was the purpose of this accommodation anything other than religious? Unquestionably, the accomodation was to meet a requirement peculiar to the residents of Kiryas Joel -- that their children be permitted to associate only with children of the Satmar Hasidic sect. As I read the record, there is no dispute: (1) that the mandate of a separate and isolated existence is an important tenet in the Satmar Hasidic religious doctrine and inherent in the Satmar culture and way of life; or (2) that it is particularly important that this requirement of separation be strictly observed in the upbringing and education of Satmar children.

Creating the special School District which encompasses only the Village of Kiryas Joel achieved this accomodation; special education could be furnished to the children of Kiryas Joel through their own exclusive program inside the village limits where the children would mix only with the children of the Satmar faith. That a statute which is clearly intended to meet the special religious requirements of a particular sect is a statute having a religious purpose seems self-evident. If more is needed, it may be found in the record and the Legislative history of Chapter 748 (*see*, Bill Jacket, ch 748, L 1989; *see also*, Lentol Memorandum and Silver Memorandum, *supra*, n 1), and, indeed, in our prior decision concerning the special education for the children of this very village (*Board of Education v Wieder*, 72 NY2d 174, 179-180).

It is argued, however, that the legislative purpose of Chapter 748 was to obviate the emotional and psychological trauma of the children upon being taken from the isolation of their unique community and placed with other children whose ways are different from theirs, and that, thus, the statute has a secular purpose. But, there is nothing in the statute or its

legislative history suggesting that the enactment of Chapter 748 was related to the psychological stress of the children or prompted by anything other than the well-meaning desire to comply with the religious requirement of keeping the Satmarer children separate from other children, concededly the cause of whatever emotional or psychological effect the children may have suffered. Indeed, the Appellate Division noted:

The record, however, contains uncontradicted evidence of a direct link between the language, lifestyle and *environment of the community's children and the religious tenets, practices and beliefs of the community*. Based upon similar evidence and in a similar procedural posture, the Court of Appeals had little difficulty finding such a connection. "With an apparent over-all goal that *children should continue to live by the religious standards of their parents*, 'Satmarer want their school to serve primarily as a 'bastion against undesirable acculturation, as a training ground for Torah knowledge in the case of boys, and, in the case of girls, as a place to gather knowledge they will need as adult women'" (*Board of Education v Wieder, supra*, at 180 [emphasis added]) ([*Grumet, supra*, at 23, [emphasis added]]).

The question is not whether some legislative solution for prescribing psychological services for the Satmar children could be devised that would have a secular purpose and thus meet the first *Lemon* test. We are concerned only with the legal question of the purpose of the specific legislation before

us. Chapter 748 establishes what amounts to a private school to furnish special education services at public expense to the residents of Kiryas Joel in order to accomodate their religiously mandated requirement of separation for their children. It does so through the extraordinary means of creating within an existing school district another co-existing district designed only to include a village whose residents are almost exclusively of a particular religious sect.

If a statute does not have a clearly secular purpose, it fails the first or "purpose" test of *Lemon* (see, *Wallace v Jaffree*, 472 US 38, 56). Justice Powell's explanation of the first *Lemon* test in his *Wallace* concurrence is especially apt here:

The first inquiry under *Lemon* is whether the challenged statute has a 'secular legislative purpose.' *Lemon v Kurtzman*, *supra*, at 612. As Justice O'Connor recognizes, this secular purpose must be 'sincere'; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a 'sham.' *Post*, at 75 (concurring in judgment). In *Stone v Graham*, 449 U.S. 39 (1980) (*per curiam*), for example, we held that a statute requiring the posting of the Ten Commandments in public schools violated the Establishment Clause, even though the Kentucky Legislature asserted that its goal was educational (*Wallace*, *supra*, at 64 [Powell J., concurring]).

But for the Satmarers' religious mandate of separation, no statute and no governmental expenditures for special education services for the residents of Kiryas Joel would have been necessary. In short, the accomodation of the Satmarers' religious requirements "'was and is the law's [only] reason for existence'" (*Wallace, supra*, at 75 [O'Connor J., concurring], quoting *Epperson v Arkansas*, 393 U.S. 97, 108).

Realistically, can the legislative creation of the Kiryas Joel School District to make special additional educational services available in order to obviate the religious objections of its residents have a purpose other than religious? As a matter of common sense -- given the wording of the statute, its apparent intent and the absence of any reference to other than a religious purpose in the legislative history -- the answer must be no.

Assuming, however, that Chapter 748 can be construed as having a clearly secular purpose (*see, Wallace, supra* at 56), I believe that, in its effect, it cannot be anything but a government action which unequivocally endorses religion in violation of the second *Lemon* test (*see, Wallace*, at 69 [O'Connor J., concurring]). Not only have the legislative and executive branches of government acted for the special benefit of a particular religious sect in creating the Kiryas Joel School District, but their action entails state aid which will relieve the private Talmudic academies and the residents of the Kiryas Joel Village of the financial burdens of providing required special education for the

Satmarer children.² Thus, Chapter 748 -- like the money grants for maintenance and repair, the tuition reimbursement grants, and the income tax benefits struck down in committee for in *Committee For Public Education v Nyquist* (413 U.S. 758) -- constitutes the sort of state financial assistance for sectarian education which has the effect of furthering the religious mission in contravention of the second *Lemon* test (see, *School Dist. of Grand Rapids v Ball*, 473 US 373, 393-395; *Meek v Pittenger*, 421 US 349, 364-366; *Aguilar v Felton*, 473 U.S. 402, 422 [O'Connor J. dissenting]). As the Supreme Court recently stated in regard to its holdings in *Meek* and *Ball*:

² The Budget Report on the Bill which was later enacted as Chapter 748 contains the following:

Based on local wealth data provided by the Monroe-Woodbury school district, and assuming that the 100 special education pupils in the Kiryas Joel school district will be placed in programs qualifying for the high cost component of excess cost aid, we estimate a new Kiryas Joel school district budget of about \$1.3 million and new State aid of about \$400,000-450,000. This would leave a local tax bill of about \$900,000. Since Monroe-Woodbury attributes about \$1.4 million of its tax base to the Village of Kiryas Joel, it appears that the Village's tax payers will benefit from both new State Aid and lower, local property taxes as a result of the creation of the new district. Also based on data supplied by Monroe-Woodbury (and current data available from the State Education Department), we estimate that the loss of property and income wealth attributed to the Village of Kiryas Joel will make Monroe-Woodbury poorer to the extent that it will receive operating aid on a formula basis rather than on save-harmless, due to its then lower wealth, would not occur until the 1991-92 school year, we project such State aid increases would amount to 1.4 million [emphasis added].

[T]he programs in Meek and Ball -- through direct grants of government aid -- relieved sectarian schools of costs they otherwise would have borne in educating their students. See *Witters [v Washington Dept of Services for the Blind]*, 474 US 481] at 487 ("[T]he State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State") (quoting *Ball*, *supra*, at 394). For example, the religious schools in Meek received teaching material and equipment from the State, relieving them of an otherwise necessary cost of performing their educational function. 421 U.S., at 365-366. "Substantial aid to the educational function of such schools," we explained, "necessarily results in aid to the sectarian school enterprise as a whole," and therefore brings about "the direct and substantial advancement of religious activity." *Id.*, at 366. So, too, was the case in *Ball*: The programs challenged there, which provided teachers in addition to instructional equipment and material, "in effect subsidize[d] the religious functions of the parochial schools

by taking over a substantial portion of their responsibility for teaching secular subjects." 473 U.S., at 397. "This kind of direct aid," we determined, "is indistinguishable from the provision of a direct cash subsidy to the religious school." *Id.*, at 395. (*Zobrest v Catalina Foothills School District*, *supra*, 1993 WL 209636, at 6).

Grumet v Kiryas Joel BOE
No. 120

BELLACOSA, J. (dissenting):

This case arises from a community's search for special education services on behalf of approximately 200 handicapped children who, as Satmarer Hasidic Jews, reside with their families in the Village of Kiryas Joel in Orange County, New York. A decade of controversy of virtually epic proportions is reflected in litigation at various levels of State and Federal courts and in unsuccessful efforts by various protagonists to forge a local, secular, public education program for the pupils with special needs of the Village of Kiryas Joel. The State of New York in 1989 enacted a law which held the promise of a Solomon-like solution.

Although invested with a presumption of constitutionality, that statute is judicially nullified as a violation, on its face, of the Establishment Clause of the First Amendment of the United States Constitution. Because I believe that the Court has erected a reverse presumption of unconstitutionality and because I agree with Justice Levine, dissenting at the Appellate Division, that the law is not facially defective, I respectfully dissent and vote to reserve.

L

Since 1977, the Village of Kiryas Joel has been an incorporated (since 1977) municipality in the Town of Monroe, Orange County, New York, populated by Satmarer Hasidic Jews. The lifestyle of the community -- including

distinctive dress, language, and customs -- was described by this Court in *Board of Education v Wieder* (72 NY2d 174, 179-180). Before the legislation at issue, all school children of the Village, for public education purposes, were within the jurisdiction of the Monroe-Woodbury School District. Those pupils in the Village without special needs, however, receive their schooling in Satmarer Hasidim parochial schools. They are not involved in this litigation.

The challenged legislation evolved out of a series of court cases involving disputes between the residents of the Village and the Board of Education of the Monroe-Woodbury School District (which is now aligned as a party in this lawsuit with the Kiryas Joel Board of Education) concerning the provision only of special education services to the handicapped children of the Village. In 1988, when *Board of Education v Wieder* (*id.*) was decided by this Court, the Monroe-Woodbury School District had offered the Village's handicapped students the special education services to which they were entitled under Federal and State law only at the District's public schools. The Satmarer Hasidic residents of the Village demanded a neutral site within the Village. This Court held that the courts could not mandate that the location of the services be either the District's public schools or a neutral site within the village, though this Court also unanimously urged that efforts be undertaken by the protagonists to secure a neutral site and solution (*Board of Education v Wieder*, 72 NY2d, *supra*, at 189 fn 3).

Both sides nevertheless persisted in their diametrically opposed positions, and the "true subjects of this controversy" (*id.*, at 179), the handicapped Satmarer children, received no special education. The Satmarer Hasidim removed their special-needs children from the Monroe-Woodbury School

District's public schools, after an experimental effort and period, because they felt that the District's failure to accommodate their distinct language and cultural needs had a "major adverse effect on [their special-needs children's] educational progress" and on the children's psychological and emotional well-being. Ultimately, the New York State Legislature acted to end the long standoff.

Chapter 748 of the Laws of 1989 established "a separate school district in and for the Village of Kiryas Joel, Orange County". The statute granted the new school district the powers of a union free school district under the State Education Law, and provided that the district shall be controlled by a board of education, elected by the qualified voters of the Village. The Monroe-Woodbury Board of Education unanimously supported the legislation, urging the Governor to sign the bill "because it will allow for the proper education of the Kiryas Joel handicapped children. The creation of a separate school district will serve to reduce community tension and lead to productive relationships." Governor Cuomo approved the legislation, effective July 1, 1990, commenting in the official Approval Message that "[m]y Counsel [] advises that the bill is, on its face, constitutional. I am persuaded by my Counsel's view. * * * [T]his bill is a good faith effort to solve this unique problem" (Approval Message of the Governor, 1989 NY Legis Ann at 325).

The new school district operates a public school which provides education only to the district's children with special needs. Under the statute, the district must operate in a secular manner. The superintendent of the school, who is not Hasidic, served for twenty years in the New York City public school system, where he acquired expertise in the area

of bilingual, bicultural, special education for handicapped children. The teachers and therapists, all of whom live outside the Village, teach mixed classes of boys and girls a wholly secular curriculum of subjects, such as reading, writing, arithmetic, music and physical education. The statute requires the school to comply with all State laws, rules and regulations affecting public education, including a prohibition against any form of discrimination.

II.

The New York State School Boards Association ("NYSSBA") and two of its officers instituted this action in January 1990 against the New York State Education Department and various State officials, seeking a declaration of unconstitutionality of the statute. The Kiryas Joel and Monroe-Woodbury Boards of Education intervened as defendants. Although the parties stipulated to a discontinuance of the action as to the defendant State officials, the Attorney General has continued to defend the constitutionality of Chapter 748 (*see*, Executive Law §71). The organizational plaintiffs (NYSSBA and Messrs. Grumet and Hawk, in their capacities as NYSSBA officers) were ultimately found to lack standing to challenge the statute, an aspect of the case not before us. However, the two named individuals remain as taxpayers-plaintiffs-respondents.

Plaintiffs moved and defendants cross-moved for summary judgment on facial grounds only, inasmuch as no discovery or any other factual inquiry in this case has been undertaken. Supreme Court, Albany County, held that Chapter 748, on its face, violated all three prongs of *Lemon v Kurtzman* (403 US 602) and therefore violated the principle of separation of church and state. The Appellate Division

affirmed, holding that Chapter 748, on its face, violates at least the second prong of the *Lemon* test because its primary effect is the advancement of religion. This Court also strikes the law down on only prong two, the primary effect aspect of *Lemon*, although the Concurrences advance newly refined additional bases for invalidation.

Plaintiffs press their argument before this Court that Chapter 748 violates all three prongs of the *Lemon* test. Although defendants-appellants proffered a secular purpose for the legislation, plaintiffs characterize it as a "sham" (Supreme Court referred to it as a "camouflage [of] secular garments"). Plaintiffs allege that the purpose of the statute is to cater to the "religious separatist tenets" of the Satmar Hasidim. They also argue that Chapter 748 has the primary effect of advancing the religious tenets of the Satmar Hasidim, because the statute allows them to maintain their separatism. Finally, they urge that it constitutes a State endorsement of religion.

Defendants-appellants reject plaintiffs' claims on the ground that plaintiffs have not met their heavy burden of rebutting the presumptive facial constitutionality of Chapter 748 of the Laws of 1989 beyond a reasonable doubt. Defendants also demonstrate, to the contrary, that the statute should survive facial scrutiny on all three branches of the *Lemon* test and urge that it should not be struck down without evidentiary development and as-applied analysis.

III.

No one disputes that the Legislature has the fundamental power to create a union free school district within the boundaries of a previously existing school district

to facilitate the provision of public education to a particular group of students (*see, e.g.*, Town of Greenburgh, UFSD No. 13, Chapter 559 of the Laws of 1972; Town of Mt. Pleasant UFSD, Chapter 843 of the Laws of 1970; Granada School District Act, Chapter 92 of the Laws of 1972). Plaintiffs concede that approximately 20 such school districts have been created by acts of the Legislature.

Nevertheless, plaintiffs predicate their challenge, to what is otherwise an entirely secular act of public education administration effected by the other two Branches of State government, on their sectarian interpretation of the unique, overlapping cultural and religious characteristics of the population of the Village of Kiryas Joel and its identical geographical boundaries with the new School District. They assert that the citizens of Kiryas Joel are exclusively Satmarer Hasidim and will remain as such. However, no claim is made of any alleged restrictive covenants among the Village's property owners, or of any alleged irregularity in the conduct of municipal or school district elections, or of any exclusion of non-Hasidim in any respects of governance, employment or availment of educational services. Indeed, there is no showing that non-Satmarer Hasidim students are precluded from attending and taking advantage of this special education program. What plaintiffs assert, in sum, substance and effect, is that because the municipality and school district share identical borders and frame an enclave currently populated only by Satmarer Hasidim, the very existence of the public school district by authorization of the Legislature and Executive constitutes, on its face, an establishment of religion prohibited by the United States Constitution. The logical and inexorable extension of this canon would dictate the extinguishment of the Village itself for the identical infirmity.

IV.

To evaluate plaintiffs' claims under the currently prevailing *Lemon* test, the Court must examine the purpose and effects of the legislation, as well as the possibility of government entanglement resulting from the legislation (*see, NYS School Bds. Assn. v Sobol*, 79 NY2d 333, 338-339). While many personal expressions of the Justices of the United States Supreme Court question the vitality of *Lemon* (*see, Lamb's Chapel v Center Moriches UFSD, et al*, ___ S Ct ___, 61 USLW 4549, 4553-4554 [decided 6-7-93], Scalia, J., concurring), the institutional postulate of that Court remains unchanged -- *Lemon* controls (*id.*, at 4552 and n 7, White, J., Opn of the Court). However, the analysis in an Establishment Clause case, decided nine days later, abstains from discussion of the *Lemon* test (*see, Zobrest v Catalina Foothills School District*, ___ S Ct ___, 61 USLW 4641 [decided 6-16-93]).

The first *Lemon* prong -- that "the statute must have secular purpose" (*Lemon v Kurtzman, supra*, at 612) -- is breached only if the enactment was "motivated wholly by [a religious] purpose" (*Bowen v Kendrick*, 487 US 589, 602 [emphasis added]; *see, Wallace v Jaffree*, 472 US 38, 56). Chapter 748 was enacted for the stated purpose of allowing only handicapped pupils of the Village of Kiryas Joel to receive a publicly supported, secular special education to which they are entitled (*see, Governor's Mem 1989 Legis Ann*, at 324-325). This objective satisfies the secular purpose prong of the *Lemon* test.

Next, in considering the facial attack, the Court seems satisfied that a third-prong violation, excessive entanglement, has not been demonstrated. The Kiryas Joel public school

established for this Village is not a "pervasively sectarian environment" of the type which generally raises the entanglement problem (*see, e.g., Aguilar v Felton*, 473 US 402; *Meek v Pittinger*, 421 US 349). The education program is exclusively and thoroughly nonsectarian; the staff is secular; all regulatory monitoring is of the traditionally-accepted educational variety and is designed to assure that the secular staff adheres to the State-approved secular curriculum (*see generally, Grumet v Board of Education of the Kiryas Joel Village School District*, 187 AD2d 16, 36-37 [Levine, J., dissenting]).

The Court's dispositive analysis turns ultimately on only the second *Lemon* prong, the "effects" test. Defendants contend that the educational services offered by Monroe-Woodbury School District prior to the enactment of Chapter 748 were inadequate, because the services did not accommodate "the distinct language and cultural needs of the handicapped children" in the Village, and the primary effect of the legislation is to remedy that problem. In bold dichotomy, plaintiffs' central argument that the primary effect of the statute involves "the State in sponsorship of Satmar separatist precepts" is adopted by the Court, contrary, in my view, to the spirit of the holding and analysis of *Zobrest*. The primary effect benefits the handicapped students in a secular manner; only an "attenuated" effect reaches the religion of their community.

As initially articulated, the effects prong demands of legislation that "its principal or primary effect must be one that neither advances nor inhibits religion" (*Lemon v Kurtzman, supra*, at 612). In subsequent application, the Supreme Court has augmented this restriction to require that any nonsecular effect be remote, indirect and incidental.

Courts attempting to apply the "effects" test must also grapple with the related subsidiary concern of whether the governmental action constitutes an "endorsement" of religion. As Justice Kennedy recently observed, however, the Supreme Court's unsettled jurisprudence in the area of possible government "endorsement" of religion leaves this sub-branch of the *Lemon* test somewhat suspect (see, *Lamb's Chapel v Center Moriches UFSD, et al*, ____ S Ct ____, 61 USLW 4549, 4553 [decided 6-7-93][Kennedy, J., concurring], *supra*).

The Supreme Court has used "endorsement" as a factor for assessing whether an impermissible purpose or effect infects a challenged law (see, e.g., *Grand Rapids School Dist. v Ball*, 473 US 373, 389); however, the meaning of "endorsement" is not "self-revealing" (compare, *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, ____ S Ct ____, 61 USLW 4587, 4598 [Souter, J., concurring]).

Unraveling whether a particular governmental action runs afoul of this test is a tricky and complicated process. Justice O'Connor initially proposed the "no endorsement" test in *Lynch v Donnelly* (465 US 668, 691-693 [O'Connor, J., concurring]). Its protean -- and controversial -- nature is evidenced by the fact that in that case she found that a municipality's display of a Christmas creche was not an endorsement of religion. In her view, the printing of "In God We Trust" on coins and the opening of court sessions with "God save the United States and this Honorable Court" were also not constitutionally offending endorsements (*id.*, at 693).

Justice O'Connor in *Wallace v Jaffree* (472 US 38, *supra*) offered an "objective observer" refinement to the endorsement factor. Much like the reasonable person embodied in the negligence standard, the so-called objective observer is expected to form a perception on the basis of familiarity with "the text, legislative history, and implementation of the statute" as to whether a particular State action constitutes an endorsement of religion or of a particular religious belief (*id.*, at 76). Moreover, any objective observer would presumably also be "acquainted with the Free Exercise Clause and the values it promotes" (*id.*, at 83). Thus, the objective observer should be aware of the overlap and tension between the Establishment and Free Exercise Clauses, and the permissibility of accommodation to Free Exercise concerns (*id.*). To be sure, the Supreme Court has not yet adopted Justice O'Connor's nuance for detecting an alleged endorsement, but neither has it otherwise clarified the method and criteria for unveiling an impermissible endorsement (*see, e.g., Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Enforcement" Test*, 86 Mich L Rev 266).

Reasonable minds may differ as to whether the actuality or the symbolism of the State's facilitation of publicly-administered special education to handicapped pupils of an incorporated municipality is an endorsement of the children's or their parents' religion. To allow for no reasonable doubt on a facial review and to decide this case as a forbidden establishment of a religion is at least arguable. "Objective observers" could not, in my view, so definitively conclude or perceive this situation as an establishment of a religion, without inspiring some inquiry as to whether their views perhaps suffered from a predisposed hostility to

religion in the constitutional debate sense. Truly objective observers should be able to conscientiously accept this legislation as secular, neutral and benign within the reasonable doubt spectrum (*see*, Tribe, American Constitutional Law, 1176, 1187-1190, 1221). For comparative analysis, as an example, one might view the direct aid to the handicapped pupil in a parochial school in *Zobrest* as the scaling of the wall of separation; yet, it was held constitutional under a broadly applicable analysis. In contrast, in this case the State stayed safely off and away from the forbidden wall by aiding a group of handicapped pupils in a specially created public school; yet, the Court here declares the legislative act unconstitutional. I find this perplexing, to say the least.

This Court has said that "[g]overnmental action 'endorses' religion if it favors, prefers, or promotes it" (Majority opn, at 11; *see also*, *New York State School Bds. Assn v Sobol*, *supra*, 79 NY2d, at 339). In applying that proposition at face value, the Court concludes that Satmarer Hasidism is impermissibly favored, preferred or promoted by Chapter 748. I disagree because context is key (*see*, *New York State School Bds. Assn. v Sobol*, *supra*). Here, no message of endorsement for Satmar theology or its particular separatist tenets need necessarily or can fairly be inferred, either by objective third parties or by the protagonists themselves. On the other hand, it can fairly be said that the People of the State of New York, as a whole, gain a compelling benefit in the compromise solution achieved here. The New York commonweal is primarily advanced. It should not be forgotten or overlooked that the long-simmering, underlying dispute spilled over the borders of the Village into the broader surrounding community, and resulted in a complete impasse. The legislation, judicially dissolved

in this case, was the negotiated denouement at the highest policy level available in a democracy, the State Legislature. As Professor Tribe has noted, "[l]eaving room for legislatures to craft religious accommodations recognizes that *they may be in a better position than courts* to decide when the advantages of strict neutrality are overstated" (Tribe, American Constitutional Law §14-7, at 1195 [2d ed] [emphasis added]). Former Justice Brennan emphasized this important nuance by observing that "even when the government is not compelled to do so by the Free Exercise Clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion" (*Marsh v Chambers*, 463 US 783, 812 [Brennan, J., dissenting]).

The incidental, "attenuated" benefit to the minority Satmar viewpoint supports this State's rich pluralistic tradition and does not diminish, but rather enhances, the common good. I conclude that the incidental benefit to the Satmar Hasidim citizens does not render the State's legislative solution facially impermissible because:

[i]t does not follow, of course, that government policies with secular objectives may not incidentally benefit religion. The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur. *See, Mueller v Allen*, 436 US 388, 393, 103 S Ct 3062, 3065, 77

L.Ed.2d 721 [1983]. (*Texas Monthly, Inc. v Bullock*, 489 US 1, 10.)

The unmistakable reality of this case is that the stricken legislation tried to create a secular public school for pupils with special education needs. The Majority concludes that the effort fails. Yet, the new public school district offers programs and services at odds with many basic precepts of Satmarer Hasidism. Secularism itself is antithetical to Hasidism, yet secularism is the *quid pro quo* imposed by the State for these Village residents to avail themselves in this way of State-regulated special educational services for their handicapped youngsters. Though the Legislature bent over backwards, as a last resort, to address the legitimate special education needs of the Satmarer students, it did not bend to the theology of their families or community (*see generally*, Tribe, American Constitutional Law §14-7, at 1195 [2d ed]). For its effort, the Legislature and Executive and the citizens who sought recourse through the democratic process are deemed religious gerrymanderers and educational segregationists (*see*, Concurring Opn, Kaye, Ch.J., at 5, 11; *contrast*, *Mtr. of Wolpoff v Cuomo*, 80 NY2d 70, 78-80).

On the other hand, there has been substantial approbation from the surrounding and affected non-Satmarer community for the fairness and equity of the State providing a secular solution for what had previously proved to be an intractable local dispute. Indeed, defendant-intervenor-appellant Board of Education of the Monroe-Woodbury Central School District has not regarded the legislation as a repudiation of the secular educational principles for which it previously and steadfastly fought as litigant against the

Satmarer Hasidim, or as an approval of the separatist tenets of the Satmar. Although it was unable to achieve a solution on its own, its present amity is noteworthy (*Board of Education v Wieder*, 72 NY2d 174, *supra*).

As the Supreme Court noted in *Wolman*, "[t]he fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the Court in *Meek [v Pittinger]*" (*Wolman v Walter*, 433 US 229, 247). "The purpose of the program is to aid school children * * * * Certainly the Establishment Clause should not be seen as foreclosing a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community" (*id.*, at n 14). The United States Supreme Court built on those comments in *Zobrest v Catalina Foothills School District* (___ S Ct ___, 61 USLW 4641 [decided 6-16-93], *supra*) by observing that "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit" (*id.*, at 4643, Rehnquist, Ch.J., Opn of the Court). That is the substantive effect of this legislation. This Court, nevertheless, objects as to the form selected and prescribed by this State's Legislature and Executive.

In fact, *Board of Education v Wieder* (72 NY2d 174, *supra*) aspirationally urged the provision of services separately to the handicapped students of Kiryas Joel, if Monroe-Woodbury School District could find a way to do so (*id.*, at 189, fn 3). *Wolman* was offered as authority and a guidepost of significant promise for the Legislature in promulgating its ultimate substantive results (*id.*). Ironically,

the Legislature's action is criticized as radical and not sufficiently tailored (Concurring Opn, Kaye, Ch.J., at 1, 11-12).

I conclude that strong and sufficient authority and analysis, past and immediate, support the view that the principal or primary effect of the challenged legislation does not advance religion in this unique context, and that no endorsement of religion may be fairly inferred.

V.

This latest litigation reaches this Court by appeal as of right on constitutional grounds from the affirmance of summary judgment granted to plaintiffs in the Supreme Court declaring Chapter 748 facially unconstitutional. In that procedural framework, of course, disputed inferences or factual issues must be viewed in the light most favorable to defendants and challenges on an as-applied basis should await a future day of reckoning. Undeniably, a sharp Sword of Damocles hangs over the officials charged with implementation of this statute. As Governor Cuomo observed, "[o]f course this new school district must take pains to avoid conduct that violates the separation of church and state * * * * I believe they will be true to their commitment" (Approval Message of the Governor, 1989 NY Legis Ann at 325, *supra*).

The concerns about the degree under which this new school district actually operates within the direction and control of elected community leaders who share a particular religious persuasion are issues of applied fact, not law. A similar fact mix is presented as to whether the creation of such a school is rooted solely in the religious preferences of

the Satmar or in their cultural, essentially secular, needs and rights, which are entitled to an enlightened and permissible societal accommodation. The needs, at least as emphasized by defendants, stem from the additional emotional impacts on Satmarer handicapped students. Defendants note that if these students -- already special -- are compelled to leave the Village and attend special education instruction in the Monroe-Woodbury public schools, they are met with a negative and hostile environment in which their language, customs and appearance are regarded as oddities, at best. Justice Levine sagely observed in dissent at the Appellate Division that deeply troubling concerns persist as to whether the courts are able, even in trial, to delve into, trace and ascertain the "true" Satmar theology and precepts (*Grumet v Bd. of Education of the Kiryas Joel Village School Dist.*, *supra*, 187 AD2d, at 29 [Levine, J., dissenting]; *see also*, Tribe, American Constitutional Law §14-11, at 1231 [2d ed]). The bottom procedural line is that this Court has plainly disfavored summary disposition when faced with similarly sensitive and complicated questions of fact (*see, Ware v Valley Stream High School*, 75 NY2d 114, 131).

VI.

Notably, the record in this case documents sharp contrasts between the manner in which the secular special educational services are provided in the Kiryas Joel public school and the distinctive religious lifestyle of the Village. English is the language of instruction within the school; Yiddish is the medium of communication within the Village. In contrast to the method of education at the sectarian schools in the Village, male and female students at the public special education school are grouped together for instructional purposes at the special school; instructional materials are not

based upon the sex of the student being instructed; female employees are not prohibited from exercising authority over male employees; the physical appearance of the building is secular, including the significant absence of mezuzahs on the doorposts; and the dress of the employees is secular in appearance. The democratically-elected Board of Trustees of the Kiryas Joel Village School District has strained to create a nonsectarian educational environment which is faithful to the secular command of the statute. Plainly, this effort is indicative of the secular compromise the Hasidim community was willing to absorb to allow the special education needs of their children to be met within a public, neutral, nondenominational setting.

The judicial nullification of this latest phase of the long-standing tug-of-war prompts the larger question whether control over a public school may ever be placed in the hands of secularly-elected individuals who have a common set of religious beliefs. Does a forbidden "symbolic union" always and automatically emerge? The three Opinions of the Majority suggest so, but I emphatically think not. It is important and fundamental to understand that the establishment of a union free school district geographically identical to an incorporated municipality, in the context of the constitutional and statutory guarantees of public education, neutral religious rights and nondiscrimination provided by both Federal and State law, should not be stigmatized as aid to a particular denomination, simply because the inhabitants of that municipality are predominately or even exclusively members of that denomination.

For the Court to reject the Legislature's answer with a blunt "No" deprives the citizens of Kiryas Joel of certain educational prerogatives in contravention of their fundamental

right to self-governance. Their free exercise of religion is also inextricably implicated and compromised, simply because they have chosen to live and believe in a particular way together in an incorporated village. This dogmatic "No" at the end of a long, difficult odyssey once against strips the special-needs children of their protected public education rights. In effect, their Free Exercise rights are burdened by draping a drastic, new disability over the shoulders of young pupils solely on account of the religious beliefs of their community (see, *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, ____ S Ct ____, 61 USLW 4587 [Scalia, J., concurring], *supra*; see also, *McDaniel v Pary*, 435 US 618).

The facile notion that the cultural, psychological and secular differences of the special-needs children of Kiryas Joel cannot be classified as anything but religious in nature should be rejected as alien to our most cherished traditions and values. The cultural disposition and circumstances of handicapped Satmarer children should not disqualify them from government attention on the bare conclusion that their different-ness is derived solely from their religious beliefs and, therefore, is constitutionally inseparable from their religiosity. A culturally diverse Nation, which proclaims itself under a banner, *E Pluribus Unum*, should not tolerate such a self-contradiction, for to penalize and encumber religious uniqueness in this way, in effect, strikes the "E Pluribus" and leaves only the "Unum."

As Justice Levine cogently cautioned in his dissent at the Appellate Division:

In effect, the majority is saying that the State may not respond to a bona fide *secular interest* of the Satmarer Hasidim, i.e., the

psychological and emotional vulnerabilities of their handicapped children, because the culture bringing about the insecurities of these youngsters was "molded" by Satmar religious precepts. In a real sense, then, the majority is thus holding that merely because of some link between their religion and a legitimate secular need, the Satmarer are disqualified from receiving from the State the purely secular services to meet that secular need (*Grunet v Board of Education of the Kiryas Joel Village School District*, *supra*, 187 AD2d at 29 [Levine, J., dissenting]).

Courts have no choice but to enter the struggle to examine the evidence and demarcate between a religious practice and the secular cultural consequences of that practice in a pluralistic society after the Legislature has preserved in doing so. If the courts refuse to do so and insist instead on overturning legislation, such as that at issue here, because it is asserted to be nothing more, on its face, than a forbidden accommodation to the exercise of religious "separatism," then frank confrontation with the values and rights under the Free Exercise Clause becomes unavoidable. Without a doubt, the two clauses -- Establishment and Free Exercise -- are in some historical and modern natural tension, and the overlap of the clauses may be said to create a "zone of permissible accommodation" (Tribe, *American Constitutional Law* §14-7, at 1194 [2d ed]; *see also*, *Ware v Valley Stream High School District*, 75 NY2d 114, *supra*). Justice Souter (with Justices Stevens and O'Connor joining) recently reiterated this principle in the concurring Opinion in *Lee v Weisman* (___ US ___, 112 S Ct 2649):

That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account. The State may "accommodate" the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings. *See, e.g., Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Amos*, 483 US 327 [1987]; *see also, Sherbert v Verner*, 374 US 398 [1963]. Contrary to the views of some, such accommodation does not necessarily signify an official endorsement of religious observance over disbelief (*Lee v Weisman*, *supra*, at 2676-2677).

Chapter 748 of the Laws of 1989 could be viewed as a reasonable accommodation of the Satmarer's free exercise of religion because it alleviates, as a last resort, their lack of choice in either having to forego the substantial benefits of publicly supported special educational services for their handicapped children or having to abandon their religious principles. That accommodation in these circumstances, on a facial attack and analysis, is supportable as a permissible deference to the historical and evolved predominance of Free Exercise protection in First Amendment constitutional adjudication.

I would therefore reverse and not declare Chapter 748 unconstitutional on its face. The judicial nullification of the democratic prerogatives and solution for this intracable Town-wide controversy is not justified. Instead, it seems to spring from a reflexive veneration of a symbolic metaphor that sacrifices concededly-necessary special education

services of a small group of handicapped pupils. A real wall of separation thus arises and solidifies to a mythic height and density.

Order modified, with costs to plaintiffs, in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Smith. Chief Judge Kaye and Judges Simons and Hancock concur, Chief Judge Kaye and Judge Hancock in separate concurring opinions. Judge Bellacosa dissents and votes to reverse in an opinion in which Judge Titone concurs.

Decided July 6, 1993

APPENDIX B

**Supreme Court - Appellate Division
Third Judicial Department**

Decided and Entered: December 31, 1992

65398

**LOUIS GRUMET, Individually
and as Executive Director
of the New York State School
Boards Association Inc.,
et al.,**

Respondents,

v.

OPINION AND ORDER

**BOARD OF EDUCATION OF
THE KIRYAS JOEL VILLAGE
SCHOOL DISTRICT et al.,
Appellants.**

Calendar Date: September 15, 1992

Before: Levine, J.P., Mercure, Mahoney, Casey and
Harvey, JJ.

Miller, Cassidy, Larroca & Lewin (Lisa Burget and George Shebitz of counsel), Washington, D.C., for Board of Education of the Kiryas Joel Village School District, appellant.

Ingerman, Smith, Greenberg, Gross, Richmond, Heidelberger, Reich & Scricca (Lawrence W. Reich of counsel), Northport, for Board of Education of the Monroe-Woodbury Central School District, appellant.

Jay Worona, New York State School Boards Association, Albany, respondent.

Robert Abrams, Attorney-General (Julie S. Mereson of counsel), Albany, pursuant to Executive Law § 71.

Bernard F. Ashe (Gerard John De Wolf of counsel), Albany, for New York State United Teachers, *amicus curiae*.

Marc D. Stern, New York City, for American Jewish Congress, *amicus curiae*.

Stanley Geller (Lisa Thureau of counsel), New York City, for Committee for Public Education and Religious Liberty, *amicus curiae*.

Casey, J.

Appeal from a judgment of the Supreme Court (Kahn, J.), entered February 10, 1992 in Albany County, which, *inter alia*, granted plaintiffs' motion for summary judgment and declared the Laws of 1989 (ch 748) unconstitutional.

The Laws of 1989 (ch 748) (hereinafter chapter 748) created a new school district, the Kiryas Joel Village School District (hereinafter the Village District), consisting of the territory of the Village of Kiryas Joel (hereinafter the Village), a community of Satmarer Hasidim located wholly within the boundaries of the Monroe-Woodbury Central School District (hereinafter the Monroe-Woodbury District) in Orange County. The statute reflects a political solution to a lengthy dispute between the Monroe-Woodbury District and the residents of the Village, most of whose children attend private religiously affiliated schools within the Village, concerning the provision of special educational services to the Village's handicapped children.

Despite earlier efforts at accommodating the undisputed needs of the Village's handicapped children, resolution of the dispute, which centered on where the services had to be offered, was sought by way of litigation. The Court of Appeals ultimately held that the Monroe-Woodbury District "is neither compelled to make services available to private school handicapped children only in regular public school classes and programs, nor without authority to provide otherwise" (*Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder*, 72 NY2d 174, 187). The court also rejected the Villagers' claim that the services had to be provided within their private schools or at a neutral site (*id.*, at 187-189). Unfortunately, the dispute was not

resolved, for the Monroe-Woodbury District continued to offer the services at its public schools and the Villagers refused to permit their children to attend the public schools. The creation of the Village District, which could establish its own public school to provide the services within the Village, was viewed as "a good faith effort to solve this unique problem" (Governor's Mem, 1989 McKinney's Session Laws of NY, at 2430).

Plaintiffs, the New York State School Boards Association (hereinafter the Association) and two officers of the Association, commenced this action against several State officials, including the Commissioner of Education and the Comptroller, seeking a judgment declaring chapter 748 unconstitutional. The two school districts moved to intervene as defendants and their motions were granted. Thereafter, the parties stipulated to the discontinuance of the action as to the State officials, although the Attorney-General continued to defend the constitutionality of the statute pursuant to Executive Law § 71. The parties cross-moved for summary judgment and Supreme Court declared the statute unconstitutional, resulting in this appeal.

The preliminary issue to be addressed is the question of standing. Defendants maintain that the Association and its officers, in their capacity as representatives of the Association, do not have standing to maintain this action. We agree. There is nothing in the record to establish that the Association itself is a citizen-taxpayer within the meaning of State Finance Law article 7-A and there is no claim that the Association has sustained any injury in fact. Accordingly, the Association does not have standing in its own right to maintain this action (*see, Matter of Otsego 2000 v Planning Bd. of Town of Otsego*, 171 AD2d 258, 269, *lv*

denied 79 NY2d 753). Nor has it been shown that the Association meets the three requirements for associational or organizational standing (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 775). As units of municipal government, the Association's member school boards do not have the substantive right to raise constitutional challenges to a State statute, particularly in the absence of any claim that compliance with the statute will force one or more of the member school boards to violate a constitutional proscription (see, *Matter of Jeter v Ellenville Cent. School Dist.*, 41 NY2d 283, 287). The only two school districts that might arguably have standing, the Monroe-Woodbury District and the Village District, are parties to this action and the Association clearly does not represent their interests. We conclude, therefore, that the Association and the officers of the Association lack standing to maintain this action. We note that plaintiffs' reliance on *New York State School Bds. Assn. v Sobol* (168 AD2d 188, *aff'd* 79 NY2d 333) is misplaced, for the issue of the Association's standing to maintain that action was neither raised nor decided.

The two individual plaintiffs, Louis Grumet and Albert W. Hawk, are named as party plaintiffs individually, as well as in their capacity as officers of the Association. In their individual capacity, each clearly meets the definition of citizen-taxpayer contained in State Finance Law § 123-a and, therefore, they have statutory standing to maintain an action for declaratory or injunctive relief to prevent the unconstitutional disbursement of State funds (State Finance Law § 123-b [1]). It is undisputed that the Village District created by chapter 748 will receive State funding and, therefore, the constitutionality of that statute can be challenged in a citizen-taxpayer action (see, *Matter of Cario v Sobol*, 157 AD2d 172, 175). The fact that the action was

discontinued as to the State officials when the two school districts intervened as party defendants does not alter this conclusion, for the expenditure of State funds remains an issue and the Attorney-General continues to appear in the action pursuant to Executive Law § 71.

Turning to the merits, we agree with Supreme Court that chapter 748 violates the Establishment Clause of the US Constitution and NY Constitution, article XI, § 3. The tripartite analysis under the Establishment Clause introduced in *Lemon v Kurtzman* (403 US 602, 612), which the United States Supreme Court declined to reconsider in *Lee v Weisman* (___ US ___, ___, 112 SCt 2649, 2655), requires: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion * * * [and third], the statute must not foster 'an excessive governmental entanglement with religion'" (*Lemon v Kurtzman*, *supra*, at 612-613, quoting *Walz v Tax Commn.*, 397 US 664, 668 [citation omitted]).

According to defendants, the statute has the secular purpose of providing special educational services to handicapped children who are not receiving those services. This argument ignores two undisputed facts: the handicapped children of the Village were already entitled to receive those services pursuant to existing Federal and State law (*see*, 20 USC § 1400 *et seq.*; Education Law § 4401 *et seq.*), and those services were actually available to the Village children from the Monroe-Woodbury District, within which the Village was located. The only reason that the children did not receive the services is their parents' refusal to let them attend the public schools of the Monroe-Woodbury District where the services were available. The stated reason for this

refusal is the fear and trauma allegedly sustained by the children upon leaving the language, lifestyle and environment of the Village and mixing with others (*Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder*, 72 NY2d 174, 188, *supra*). The challenged statute, therefore, was designed not merely to provide special educational services to the handicapped children of the Village, but to provide those services within the Village so that the children would remain subject to the language, lifestyle and environment created by the community of Satmarer Hasidim and avoid mixing with children whose language, lifestyle and environment are not the product of that religion. The dissent finds a secular purpose for the statute in that it would provide the handicapped children of the Village with the publicly supported, secular special educational services they need and to which they are entitled, but as previously noted those services were already available to all of the handicapped children of the Monroe-Woodbury District, including the handicapped children of the Village. Thus, the only secular need for the statute recognized by the dissent did not, in fact, exist.

Assuming that the statute can be viewed as having a secular purpose, the second guideline of the *Lemon* test requires that the principal or primary effect must not advance religion. The Court of Appeals recently explained:

A particular concern under the "effects" prong is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious

choices" * * *. Context determines whether particular governmental action is likely to be perceived as an endorsement of religion * * *. Governmental action "endorses" religion if it favors, prefers, or promotes it * * * (*New York State School Bds. Assn. v Sobol*, 79 NY2d 333, 339-340, quoting *School Dist. of City of Grand Rapids v Ball*, 473 US 373, 390 [citations omitted]).

Defendants claim that the creation of a school district to provide educational services should be treated no differently than the creation of a village to provide municipal services, such as police and fire protection. The Supreme Court, however, has recognized that the relationship between government and religion in the education of children is a sensitive one and that government's activities in this area can have a magnified impact, creating "an all-too-ready opportunity for divisive rifts along religious lines in the body politic" (*School Dist. of City of Grand Rapids v Ball*, *supra*, at 383).

Defendants also contend that the provision of educational services to sectarian students and the segregation of those students from others who are not of that sect are incidental benefits which do not offend the Constitution (*see, Mueller v Allen*, 463 US 388, 393; *Wolman v Walter*, 433 US 229, 247-248). Considering the entire context in which the statute was enacted, we conclude that the statute not only authorizes a religious community to dictate where secular public educational services shall be provided to children of the community, it creates the type of symbolic impact that is impermissible under the second prong of the *Lemon* test.

As previously noted, the educational services which the statute was intended to provide were already available to the Village children at public schools within the school district where they resided but outside the boundaries of the Village. If those services were inadequate or inappropriate, as defendants now suggest, existing remedies were available for the parents to pursue (*see*, Education Law § 4404). Instead, the parents claimed that the service had to be provided within the private schools in the Village or at a neutral site within the Village. When this claim proved unsuccessful (*see*, *Board of Educ. of Monroe-Woodbury Cent. School Dist. v. Wieder, supra*), the parents continued to refuse the services available at the public schools of the Monroe-Woodbury District.

Chapter 748 created a school district coterminous with the Village, which is inhabited by residents who are almost exclusively of one religious sect. The school board is controlled by members of that sect and the children who attend the public school established by the district are all of that sect. The services provided by the school were already available to the children of the Village, but their parents refused to permit them to mix with other students whose language, lifestyle and environment were not the product of the same religious sect. As a result of the statute, the services which were otherwise available at the public schools of the Monroe-Woodbury District are now provided by a public school that is controlled by and located within the religious community, and the children of the community who attend that school are effectively segregated from children of other religions. Regardless of whether the public school operated by the Village District is a neutral site, and regardless of how scrupulous the district is in maintaining the secular nature of the educational services offered at the

school, we are of the view that the symbolic union between church and state effected by the creation of a school district coterminous with a religious enclave to provide within that enclave educational services that were already available elsewhere is significantly likely to be perceived by adherents of the Satmarer Hasidim as an endorsement, and by nonadherents as a disapproval, of their individual religious beliefs (*see, School Dist. of City of Grand Rapids v Ball, supra*, at 389-392).

We emphasize that it is not the location of the public school in the religious community and the provision of public educational services to sectarian students that we find offensive to the Establishment Clause (*see, Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder, supra*, at 189 n 3). The impermissible effect is the symbolic impact of creating a new school district coterminous with a religious community to provide educational services that were already available in an effort to resolve a dispute between the religious community and the school district within which the community was formerly located, a dispute based upon the language, lifestyle and environment of the community's children created by the religious tenets, practices and beliefs of the community.

The dissent asserts that we are foreclosed from considering whether the religious tenets, practices and beliefs of the community played a role in the Village's refusal to accept the special educational services offered by the Monroe-Woodbury District. The record, however, contains uncontradicted evidence of a direct link between the language, lifestyle and environment of the community's children and the religious tenets, practices and beliefs of the community. Based upon similar evidence and in a similar

procedural posture, the Court of Appeals had little difficulty finding such a connection. "With an apparent over-all goal that *children should continue to live by the religious standards of their parents*, 'Satmarer want their school to serve primarily as a bastion against undesirable acculturation, as a training ground for Torah knowledge in the case of boys, and, in the case of girls, as a place to gather knowledge they will need as adult women' * * *" (*Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder*, *supra* at 180 [emphasis supplied, citation omitted]). The stated reason for the Satmarer parents' refusal of the services offered by the Monroe-Woodbury District was the emotional toll on the Satmarer children allegedly sustained upon "leaving their own community and being with people whose ways were so different from theirs" (*id.*, at 181). Because the "ways" of the Satmarer children were molded by the religious standards of their parents (*id.*, at 180), there can be little doubt that, in fact, religion played a role in the dispute, which we have considered as one of several factors in our decision. Contrary to the dissent's interpretation, our holding, which concerns only the validity of the statute that created a new school district coterminous with a religious community to provide secular services that were already available to the community, has no bearing on whether the Satmarer are somehow "disqualified" from receiving those services. It is noteworthy that although the dissent asserts that we must ignore these undisputed facts, the dissent's "fair and comprehensive analysis by an objective observer" encompasses a search both within and without the record to support the theory that the statute's creation of a school district coterminous with a religious community to provide services to that community which were already available is not relevant in determining whether the particular

governmental action is likely to be perceived as an endorsement of religion.

Finding that the Satmarer's handicapped children have "special psychological vulnerabilities * * * to exposure to the outside world", the dissent is apparently of the view that the special educational services offered by the Monroe-Woodbury District were not "protective" of these "special psychological vulnerabilities". Pursuant to Federal and State Law, handicapped children are entitled to an appropriate special education program and placement, and a parent who finds the placement unacceptable can seek review (*Matter of Northeast Cent. School Dist. v Sobol*, 79 NY2d 598, 603). If, as the dissent assumes, the services offered by the Monroe-Woodbury District were inappropriate as not "protective" of the Satmarer children's "special psychological vulnerabilities", the parents had an available administrative remedy to review the proposed placements pursuant to Education Law § 4402 and, if necessary, judicial review of the determination produced by the administrative appeal. This review process could have addressed all of the parents' secular concerns. The dissent's suggestion that the creation of a new school district was the appropriate remedy to address the Satmarer parent's claim that the services offered by the Monroe-Woodbury District were inappropriate for the special needs of their children is less than compelling.

The dissent's alternative argument, that the creation of a new school district might constitute "a valid alleviation of a burden on the Satmarer's religious precepts", is premised on "the majority's assumption that segregated education of their young is an integral part of Satmar religious precepts". We have made no such "assumption". We have merely recognized that uncontradicted evidence in

this record and in the prior litigation establishes a direct link between the Satmarer parents' refusal to accept the services of the Monroe-Woodbury District and the religious tenets, practices and beliefs of the community which have molded the language, lifestyle and environment of the community's children, resulting in an alleged emotional toll when the children leave the community and are with people whose ways are so different from theirs. The Satmarer themselves do not claim that they refused the services of the Monroe-Woodbury District because segregated education of their young is an integral part of Satmarer precepts and we have not made such an assumption. By going beyond the stated position of the Satmarer, the dissent has disregarded its own limitation on the scope of review of the facial validity of chapter 748.

Having concluded that even if chapter 748 has a secular purpose its principal or primary effect advances religion, we see no need to consider the third prong of the *Lemon* test. Although we have concluded that the Association and its officers lacked standing to maintain this action, we see no need to modify Supreme Court's declaratory judgment, which did not grant any specific relief to the Association or its officers. The individual plaintiffs have standing to maintain this action as citizen-taxpayers and Supreme Court granted the appropriate declaratory relief. Its judgment should, therefore, be affirmed.

Mercure, Mahoney and Harvey, JJ., concur.

Levine, J.P. (dissenting).

In my view, it was error for Supreme Court to have granted summary judgment declaring the legislation under

review here (L 1989, ch 748) (hereinafter chapter 748) creating the Kiryas Joel Village School District (hereinafter the Village District), encompassing the territory of the Village of Kiryas Joel (hereinafter the Village) itself, to be facially invalid as a violation of the Establishment Clause of the 1st Amendment to the US Constitution or of article XI, § 3 of the NY Constitution.

I find the distinction, for Establishment Clause purposes, between a law's facial invalidity and invalidity as applied to be far from clear in the case law (*see, Bowen v Kendrick*, 487 US 589, 601-602; *id.*, at 627-628 [Blackman, J., dissenting]). What is clear, however, is that, in deciding that this case was ripe for a determination of the statute's facial invalidity on a motion for summary judgment, Supreme Court and the majority of this court have relied upon extrinsic evidence sharply disputed by the Village District and have ignored evidence submitted by the Village District showing its religiously neutral implementation of the statute, a factor I believe is relevant on the statute's validity both facially and as applied. Moreover, I think the statute is sustainable on a facial challenge even under the majority's factual assumptions, as a limited, permissible accommodation to the values represented by the Free Exercise Clause of the 1st Amendment on behalf of the Satmarer Hassidim inhabiting the Village. I would, therefore, reverse, declare the statute facially valid and remit for trial of the disputed factual issues to determine whether the statute is valid as applied. Clearly, plaintiffs have raised a challenge to the validity of the statute as applied in the second amended complaint and the submissions on their motion for summary judgment. Thus, I would give the Satmarer Hassidim their day in court to establish that the statute can be and has been implemented in a way that sufficiently separates the Village

District's provision of special educational services for their handicapped children from their religious precepts and practices to avoid conflict with the Establishment Clause.

The invalidity of a statute under the Establishment Clause, facially or as applied, is to be determined by whether it contravenes one or more of the three elements of the test announced in *Lemon v Kurtzman* (403 US 602, 612) and recently left standing by the United States Supreme Court in *Lee v Weisman* (____ US ____, ____, 112 SCt 2649, 2655). Under *Lemon*, to avoid violating the Establishment Clause a statute must have a secular legislative purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster excessive governmental entanglement with religion.

Regarding the "purpose" prong of the *Lemon* test, the legislative history of chapter 748 recites that it was enacted to break the impasse between the members of the Satmar Hassidic sect, who comprise the vast majority of the inhabitants of the Village, and the Monroe-Woodbury Central School District (hereinafter the Monroe-Woodbury District) whose territory contained the Village, over the public provision of special educational services for the handicapped children of the Village. As is more fully described in the Court of Appeals' decision in the previous litigation involving this dispute (*see, Board of Educ. of Monroe-Woodbury Cent. School Dist v. Wieder*, 72 NY2d 174), the Monroe-Woodbury District had taken the position that special educational services would only be offered at fully integrated public schools located outside the Village, whereas the Satmarer parents insisted that their handicapped children should be provided these services in the Village, either at the parochial schools where all of the nonhandicapped Satmarer

children are educated, or at a neutral site. When the prior litigation failed to resolve the dispute (*see, id.*), chapter 748 was enacted for the stated purpose of ensuring that the handicapped children of the Satmarer Hassidim would receive the publicly supported, *secular* special educational services they need and to which they are entitled, at a neutral site in the Village (*see, Governor's Mem, 1989 Legis Ann, at 324-325*).

The foregoing secular purpose is sufficient to comply with the purpose facet of the *Lemon* test, which is only breached if the enactment was "motivated *wholly* by [a religious] purpose" (*Bowen v Kendrick*, 487 US 589, 602, *supra* [emphasis supplied]; *see, Wallace v Jaffree*, 472 US 38, 56). Thus, the apprehension expressed in the majority's decision as to some additional, or perhaps ulterior, religion-based motive underlying the enactment of chapter 748 would not serve to render it invalid in this respect. Moreover, in determining the legislative purpose for Establishment Clause analysis, "a court has no license to psychoanalyze the legislators * * *. If a legislature expresses a plausible secular purpose * * * then courts should generally defer to that stated intent * * *" (*Wallace v Jaffree, supra*, at 74-75 [O'Connor, J., concurring] [citations omitted]).

The ultimate ground for the majority's invalidation of chapter 748, however, is its conclusion that the primary or principal effect of the legislation is to advance religion. I disagree. It bears emphasis that we are reviewing a determination that chapter 748 is facially invalid, made by Supreme Court in granting plaintiffs' motion for summary judgment. In deciding upon the facial validity of the statute, particularly on cross motions for summary judgment, I believe that this court should not be looking for ulterior

motives for the enactment. Rather, we are bound to look at chapter 748 as a response to the *stated* position of the Satmar sect, expressed not only in sworn affidavits here but consistently throughout the dispute over special educational services for its handicapped children (*see, Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder*, 72 NY2d 174, 180 n 2, 189, *supra*). As repeatedly stated, the motive for the Satmarer parents' refusal to accept the special educational services for their handicapped children offered by the Monroe-Woodbury District was not religious, but was to protect the children from the psychological and emotional trauma caused by exposure to integrated classes outside the Village that were inadequately addressed by the professional staff of the Monroe-Woodbury District.

Thus, on summary judgment the majority seems erroneously to be relying upon a description of Satmar religious precepts on educating the sect's nonhandicapped children contained in the affidavit of Israel Rubin, Ph.D., submitted by plaintiffs, as establishing a religion-based motivation for the refusal of the Satmarer Hassidim to accept the special educational services offered by the Monroe-Woodbury District. Such a sectarian basis for their refusal, however, appears to be directly contradicted by the affidavit of the School Board President of the Village District submitted in the instant case as to the reason why the Monroe-Woodbury District's offer of such services was refused. That affidavit states:

Monroe-Woodbury has refused to accommodate the distinct language and cultural needs of the handicapped children in [the Village] by providing their education at a neutral site in their locality. * * * Because

Monroe-Woodbury's restrictions on the educational services for the handicapped children from [the Village] would have a major adverse effect on their educational progress, the handicapped children in [the Village] were not able to receive the special educational services they needed from the public educational system.

The foregoing secular basis for the refusal to accept the services provided by the Monroe-Woodbury District was the same position asserted by the Satmarer Hassidim in the *Board of Educ. of Monroe Woodbury Cent. School Dist v Wieder (supra)* litigation. Indeed, the reason why the Court of Appeals in that case refused to entertain a belated claim that providing such special educational services at a neutral site in the Village was mandated under the Free Exercise Clause was that the Satmarer "in their submissions to the trial court insisted that, as a class, they should be exempted from public school placements only for *nonreligious* reasons - most particularly because of the emotional impact on the children of traveling out of Kiryas Joel" (*id.*, at 189 [emphasis in original]). And, in the same decision, after quoting from a treatise describing Satmar religious precepts on the education of children authored by the person whose affidavit the majority relies upon here, the Court of Appeals added in a footnote that the members of the Satmar sect in that case never conceded the accuracy of that description. "Indeed, in their submissions, they make no reference to their religious beliefs or practices, only their life-style and environment" (*id.*, at 180 n 2).

While I am not able to discern with complete confidence why the majority rejects the foregoing religious-

neutral explanation by the Satmarer for their refusal to accept the special educational services of the Monroe-Woodbury District, the majority's rationale seems to be based on either one of two propositions. The first of these is that the Satmarer's explanation is disingenuous, i.e., that segregated education of even its handicapped children is in fact at the core of the Satmar sect's religious beliefs. That proposition, however, is clearly contested by the Village District and, thus, cannot properly form the basis for granting plaintiffs' motion for summary judgment. Beyond that procedural barrier to adopting this proposition, it has grave constitutional implications because it entangles a state civil court in factfinding on what is true Satmar religious doctrine on educating handicapped children (*see*, Tribe, American Constitutional Law § 1411, at 1231 [2d ed]).

Alternatively, the majority's decision may be read as concluding that the Satmarer's professed secular explanation for rejecting the Monroe-Woodbury District's offer of services is, nonetheless, religion based, because the Satmarer's cloistered lifestyle and cultural outlook are derived from their religious beliefs. This, too, has grave constitutional implications under both religion clauses of the 1st Amendment. In effect, the majority is saying that the State may not respond to a bona fide *secular interest* of the Satmarer Hassidim, i.e., the psychological and emotional vulnerabilities of their handicapped children, because the culture bringing about the insecurities of these youngsters was "molded" by Satmar religious precepts. In a real sense, then, the majority is thus holding that merely because of some link between their religion and a legitimate secular need, the Satmarer are disqualified from receiving from the State the purely secular services to meet that secular need. The case law simply does not support such a rigidly

impenetrable wall between church and state as is implicit in this aspect of the majority's decision. Indeed, such a holding conflicts with the United States Supreme Court's decisions that a state does not violate the Establishment Clause by commemorating the secular, *cultural* aspects of the Christmas/Chanukah holiday season, despite its religious origins (see, *Allegheny County v Greater Pittsburgh American Civ. Liberties Union*, 492 US 573, 617-620; *Lynch v. Donnelly*, 465 US 668). Thus, in my view, the alleged motivations of the Satmarer Hassidim for refusing fully integrated special educational services outside the Village cannot be the basis for a determination of a facial invalidity of the statute on a summary judgment motion.

Furthermore, in resolving doubts regarding the facial validity of a statute, a court may properly look to how it has been interpreted and applied by the governmental agency charged with enforcing it. (see, *Ehlert v United States*, 402 US 99, 105-107; see also, *Grayned v City of Rockford*, 408 US 104, 110-111). Therefore, for summary judgment purposes, the sworn submissions of the Village District on the manner in which chapter 748 has been implemented should also be accepted as true. Summarized, the Village District's proof is that the provision of special educational services under chapter 748 takes place at a site distinctly and physically separate from the Village parochial schools and, indeed, from any other place of religious observance. Additionally, the services being provided are distinctly secular as to content, professional staff and physical surroundings.

In the absence of a religious purpose for creation of the Village District as a substitute for the Monroe-Woodbury District, the provision of purely secular special educational

services to the Satmarer handicapped children in an atmosphere that is *not only not* "pervasively sectarian", but actually totally devoid of religious influences, appears to be virtually indistinguishable from the provision of therapeutic and remedial services to isolated groups of parochial school students upheld by seven justices of the United State Supreme Court in *Wolman v. Walter* (433 US 229, 244-248). In *Wolman*, the Supreme Court specifically rejected the notion that the provision of secular therapeutic and remedial services to school children at a neutral site is suspect, as having the effect of advancing religion, merely because the recipients of the services were separate groups composed exclusively of parochial school students (*id.*).

If not virtually the same as in *Wolman v. Walter* (*supra*), the fact pattern which we are bound to accept in the present procedural posture of the case is far closer to *Wolman* than it is to *Parents' Assn. of P.S. 16 v. Quinones* (803 F2d 1235), the case most heavily relied upon by Supreme Court in granting summary judgment in this case. In *Parents' Assn. of P.S. 16*, the challenged program of remedial instruction for the Satmarer parochial school children at the premises of a New York City public school not only ethnically segregated the children, it virtually replicated the educational practices of the Satmar parochial school by gender segregation for teachers and students, the use of Yiddish as the primary language of instruction and adoption of a reading instruction method employed only in the parochial school (*id.*, at 1237). Additionally, in *Parents' Assn. of P.S. 16*, the court accepted factual assertions regarding Satmar religious precepts on education and relied on factual concessions of public educational authorities that are in dispute here and, thus, should be disregarded on summary judgment in the litigation at hand.

Despite the similarity between the instant case and *Wolman v Walter* (*supra*), as premised on the only facts which this court should properly consider, the majority holds nonetheless that the statutory creation of the Village District has the primary effect of advancing religion because it will be *perceived* as a symbolic state endorsement of Satmar Hassidism. As I read the majority decision, this conclusion is based upon three factors: (1) the creation of a school district coterminous with a "religious enclave", (2) the preexisting availability of special educational services for Satmarer handicapped children provided by the Monroe-Woodbury District outside the Village, and (3) that the true basis for the Satmarer's refusal to accept the integrated special educational services for their handicapped children outside the Village was the conflict which fully integrated schooling would present to their fundamental religious beliefs, or with cultural values inseparable from their religious beliefs.

As to the majority's supposition that the Satmarer's refusal to accept the special education services offered by the Monroe-Woodbury District was religion based, I shall not repeat the reasons for my strong conviction that, on a facial challenge, and particularly on a motion for summary judgment in that context, we are not permitted to go behind the publicly stated and sworn to position of the Satmarer Hassidim of a nonreligious motivation for the refusal.

At first blush, the two other factors relied upon by the majority might well be instinctively perceived as establishing that the State too readily acceded to the Satmarer's "dictates" and, in some sense, thereby symbolically endorsed the sect's religious tenets. However, the question of whether a statute's primary effect is to aid religion by reason of being

perceived as a State endorsement of some religious denomination, or of religion in general, is not to be answered by an uncritical reaction to some superficial or selective presentation of the facts or circumstances concerning the legislation in question. Justice O'Connor, the original proponent of the perception of endorsement approach to adjudging the principal effects of religion-related legislation (see, *Lynch v Donnelly*, 465 US 668, 691-692, *supra* [O'Connor, J., concurring]), has stated that "[t]he relevant issue is whether *an objective observer*, acquainted with the text, *legislative history*, and *implementation* of the statute, would perceive [the statute] as a state endorsement" (*Wallace v Jaffree*, 472 US 38, 76 *supra* [O'Connor, J. concurring] [emphasis supplied]).

A fair and comprehensive analysis by an objective observer would have to take into account (1) the professed lack of religious motive of the Satmarer Hassidim for the creation of the Village District previously described, (2) that, uncontrovertably, the Satmarer would have been content had the Monroe-Woodbury District provided educational services at a neutral site in the Village, thus obviating many of the features of the creation of the Village District relied upon by plaintiffs to show symbolic endorsement of religion, (3) that, although the elected Board of Education of the Village District is likely to be entirely composed of Satmarer Hassidim, the Board lacks autonomy in appointing a Superintendent of Schools (see, Education Law § 1711 [3]) and the Superintendent is the official controlling the administration of the program (see, Education Law § 1711

[5]),¹ and (4) that the implementation of chapter 748 has resulted in the appointment of a highly qualified professional, *not* a member of the Satmar sect, as Superintendent of Schools, who is administering the program with autonomy to provide purely secular special educational services in an atmosphere completely divorced from and in significant respects inconsistent with the precepts of the Satmar sect.

I think that the foregoing facts and circumstances would attenuate, in the eyes of an objective observer, the significance of the creation of a school district coterminous with the Village territory and the availability of special educational services outside the Village as indicia of a State endorsement of Satmar religious precepts. Both factors were merely collateral to the Satmarer's stated objective of obtaining purely secular special educational services for the sect's handicapped children and *their* willingness to accept those services in a truly nonsectarian atmosphere, so long as it was protective of the special psychological vulnerabilities of those children to exposure to the outside world. These are, in my opinion, the only inferences that can fairly be drawn from the evidence contained in the Village District's submissions, and they are insufficient to demonstrate a symbolic link between Church and State, as a matter of law (*see, Bowen v Kendrick*, 487 US 589, 613, *supra*).

Even if I were to agree with the majority, however, that the Satmar sect's refusal to accept the Monroe-

¹ Moreover, the Board of Education's ability to interject religion into the services provided to the children appears to be weak and improbable in light of the dominant supervisory and programmatic regulatory role of the State Department of Education over special educational services for handicapped children (*see, Education Law* § 4403; 8 NYCRR part 200).

Woodbury District's integrated special educational services for its handicapped children was based upon fundamental religious beliefs or upon cultural values inseparable from its religious beliefs, I would nonetheless hold that the accommodation of the State to those values and beliefs by the enactment of chapter 748 did not have the primary effect of advancing religion. Rather, the statute survives a facial challenge because its principal effect would then be to lift a substantial burden on the sect's free exercise of religion. The legitimacy of the right of an insular religious sect, under the Free Exercise Clause of the 1st Amendment, to prevent exposure of their children to the worldly influences and inconsistent secular values of the public school system was recognized in *Wisconsin v Yoder* (406 US 205, 218-219). Moreover, a state may constitutionally relieve a substantial governmental burden on a sect's exercise of its religion even when the burden falls short of an actual violation of the Free Exercise Clause (see, *Texas Monthly v Bullock*, 489 US 1, 18-19 n 8; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Amos*, 483 US 327, 334).

Here, the Monroe-Woodbury District had previously provided special educational services for Satmarer handicapped children at an annex to the sect's private parochial school for girls in the Village (see, *Board of Educ. of Monroe-Woodbury Cent. School Dist. v Weider*, 72 NY2d 174, 180, *supra*). In 1985, however, the Monroe-Woodbury District resolved that such services would only be offered in integrated classes at public schools outside the Village (*id.*). Thus, under the majority's assumption that segregated education of their young is an integral part of Satmar religious precepts, the Satmarer Hassidim were placed in the dilemma of either having to forego the substantial benefits of publicly supported educational services for their handicapped

children or availing themselves of those benefits at the price of foregoing their religious convictions regarding the manner of educating their children. Unquestionably, a governmental decision that forces a religious observer "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to [obtain the benefits] * * * puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her [religious practice]" (*Sherbert v Verner*, 374 US 398, 404; see, *Hobbie v Unemployment Appeals Commn.*, 480 US 136, 140-141).

I am conscious of the danger that an unduly broad application of an accommodation to free exercise values rationale to uphold any governmental benefit to religion could ultimately result in the Free Exercise Clause swallowing up the Establishment Clause (see, *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Amos*, *supra*, at 347 [O'Connor, J., concurring]; Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 Yale L J 1127, 1138-1139). It cannot be said at this procedural stage in the action, however, that chapter 748 crosses the line from a valid alleviation of a burden on the Satmarer's religious precepts in separately educating their handicapped children to an invalid advancement of religion by promoting the Satmar sect's ability to inculcate its religious values in educating those children. First, undoubtedly, the loss of remedial and rehabilitative educational services for Satmarer handicapped children is a discernible, substantial burden (see, *Lee v Weisman*, ___ US ___, ___, 112 SCt 2649, 2677-2678 [Souter, J., concurring], *supra*). Second, the accommodation to Satmar religious educational practices is minimal, as compared to the practices in their parochial schools in the

Village and to the accommodations described in *Parents' Assn. of P.S. 16 v Quinones* (803 F2d 1235, *supra*). The court in *Parents' Assn. of P.S. 16* took pains to suggest that a constitutionally valid, minimal accommodation to Satmar religious beliefs could have been devised in providing remedial services to the sect's parochial school students by emphasizing that "in the circumstances of the present case, it is difficult to believe that the City cannot devise alternatives for making its remedial services available to the Beth Rachel students in a way that neither requires them to disregard their religious beliefs nor appears to endorse those beliefs" (*id.*, at 1242). Third, the Satmarer Hassidim had attempted to obtain an acceptable accommodation to their religious beliefs in a less symbolically promotional manner by countersuing in *Board of Educ. of Monroe-Woodbury Cent. School Dist v Weider* (*supra*) to compel the existing public school system to provide special educational services to their handicapped children at a neutral site in the Village. When that attempt was unsuccessful (*see, id.*) the statutory creation of the Village District became the only viable remaining means to accommodate Satmar practices regarding the separate education of the sect's children, a factor weighing in favor of the validity of the legislation (*see, Tribe, American Constitutional Law* § 14-15, at 1285-1286 [2d ed]). Fourth, the statute gives the Satmarer Hassidim no greater advantage in exercising their religious educational practices than they enjoyed prior to the Monroe-Woodbury District's decision to withdraw its special educational services from a site in the Village, an additional factor favoring validity (*see, Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Amos, supra*, at 337).

Where, as here, the challenged statute promotes Free Exercise values by alleviating a substantial government-

imposed burden on a religious observance, the symbolism of a governmental endorsement is entitled to relatively little weight in determining whether the statute's primary effect is to advance religion. As Justice O'Connor observed in *Wallace v Jaffree* (472 US 38, 83):

It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute -- that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief -- courts should assume that the 'objective observer,' * * * is acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.

It follows from the foregoing that the statute facially passes the effects prong of the *Lemon* test, whether or not one agrees with the majority view that the statute represents an accommodation to the Satmarer's religious beliefs and practices.

Turning then to the remaining prongs of the *Lemon* Establishment Clause test, i.e., whether the creation of the Village District leads to an excessive government entanglement with religion, I find that for purposes of a facial challenge a violation of that standard has also not been demonstrated. In aid to education cases under the Establishment Clause, the risk of excessive entanglement has been found to arise in three forms of potential, mutual church-state intrusiveness: (1) the need for intense surveillance of a publicly supported secular educational program conducted under the auspices of religious authorities, to insure the absence of any religious indoctrination, (2) dual and overlapping administration of the religious and secular parts of the educational program, necessitating a close, continuing relationship between secular and religious educational and administrative staff, and (3) political divisiveness, for example, from budgetary competition between secular and religious programs (see, *Lemon v Kurtzman*, 403 US 602, 623, *supra*; *Aguilar v Felton*, 473 US 402, 413-414). As pointed out in *Bowen v Kendrick* (487 US 589, *supra*), however, typically a finding of excessive entanglement in educational aid cases has "rested * * * on the undisputed fact that the elementary and secondary schools receiving aid were 'pervasively sectarian' and had 'as a substantial purpose the inculcation of religious values'" (*id.*, at 616, quoting *Aguilar v Felton*, *supra*, at 411, quoting *Committee for Public Educ. & Religious Liberty v Nyquist*, 413 US 756, 768 [emphasis supplied]). The existence of a pervasively sectarian institutional setting for the Village District's programs, having a substantial purpose of religious indoctrination, certainly is not an "undisputed fact" here. Any monitoring of the program that occurs here would be exclusively of secular, not sectarian, professional staff. Furthermore, without the presence of religious

educators or administrators participating in any of the programs conducted on premises by the Village District, the possibility of entanglements from necessary secular/sectarian working relationships is speculative and remote. Such factors have been held sufficient to sustain the validity of aid to education legislation under the excessive entanglement prong of the Lemon test (*see, Bowen v Kendrick, supra*, at 616-617; *Wolman v Walter*, 433 US 229, 248, *supra*; *Roemer v Board of Pub. Works of Maryland*, 426 US 736, 762). The potential for political divisiveness as a result of the creation of the Village District also seems remote. The Satmarer handicapped children are entitled to publicly financed special educational services according to their needs irrespective of where they are provided or who provides them. The threat of political divisiveness is belied by the fact that the Monroe-Woodbury District, the political subdivision most directly affected financially by the carving out of the Village District, has consistently supported the position of the Village District in the instant action.

Based upon all the foregoing reasons, I have concluded that chapter 748 is not facially invalid under the Establishment Clause of the 1st Amendment. I would also hold it valid facially under article XI, § 3 of the NY Constitution, inasmuch as there is utterly nothing in the language of the statute or its legislative history establishing that the Village District is controlled by the Satmar sect. Accordingly, I would reverse Supreme Court's judgment, grant defendants partial summary judgment declaring chapter 748 facially valid, and remit to Supreme Court for trial on the outstanding issues of fact necessary to resolve the validity of the statute as applied.

91a

65398

ORDERED that the judgment is affirmed, without
costs.

ENTER:

Michael J. Novack
Clerk

APPENDIX C

STATE OF NEW YORK

COUNTY OF ALBANY

SUPREME COURT

LOUIS GRUMET, Individually and as Executive Director of the New York State School Boards Association, Inc.; ALBERT W. HAWK, Individually and as President of the New York State School Boards Association, Inc., and the NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC.,

Plaintiffs,

-against-

NEW YORK STATE EDUCATION DEPARTMENT; THOMAS SOBOL, as Commissioner of the New York State Education Department; NEW YORK STATE BOARD OF REGENTS; EDWARD V. REGAN, as New York State Comptroller; EMANUEL AXELROD, as District Superintendent of Orange-Ulster BOCES; BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT; BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,

Defendants.

Supreme Court - Request for Judicial Intervention

March 7, 1990-August 14, 1991 - RJ1 0190 021649 Index
No. 1054-90

JUSTICE LAWRENCE E. KAHN, Presiding

APPEARANCES: New York State School Boards
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KAHN, J.

This litigation challenges the constitutionality of Chapter 748 of the Laws of 1989, which created the Kiryas Joel Village School District. While presenting issues which are new and distinct, it continues years of litigation, which in one form or another, all emanate from attempts to obtain public funding for special education programs for children of the Satmar Hasidic Sect. Much of the history of the relationship between the present litigants has been documented by the Court of Appeals in *Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder*, (72 NY2d 174). Therein, the issue to be determined was whether special services to the handicapped children of the Village of Kiryas Joel were statutorily required to be provided in the public schools or in religiously affiliated private schools. Ultimately, the court determined that the applicable provisions of the Education Law did not require the Board of Education of the Monroe-Woodbury Central School District to offer such services only in regular public school classes. The court also rejected the contention that such services must be provided to non-public school children on the premises of the schools they normally attend. In its previous decision, the Court of Appeals set forth relevant background information, stating that:

"Kiryas Joel is a community of Hasidic Jews. Apart from separation from the outside community, separation of the sexes is observed within the Village. Yiddish is the principle language of Kiryas Joel; television, radio and English language publications are not in general use. The dress and appearance of the Hasidim are distinctive--the boys, for

example, wear long side curls, head coverings and special garments, and both males and females follow a prescribed dress code. Education is also different: Satmar children generally do not attend public schools, but attend their own religiously affiliated schools within Kiryas Joel." (p. 179 and 180).

In an acknowledged attempt to compromise the ongoing dispute, the challenged statute created a school district whose boundaries are literally contiguous with the incorporated Village of Kiryas Joel, and provided for the election of trustees with the powers and duties of trustees of a union free school district. A Board of Education was thereafter elected and the school properties within the boundaries of the new district were transferred off the rolls of the Monroe-Woodbury School District, effective July 1, 1990. The only "public" school within the new District provides educational services for handicapped children.

The instant declaratory judgment action was commenced on or about January 19, 1990 and challenges the creation of the school district on constitutional grounds, asserting that it violates the principles of separation of church and state. Plaintiffs also assert that the legislation violates equal protection guarantees. Originally, the New York State Department of Education and other state officials, including the Comptroller, were named as defendants. Motions to intervene were made by the Board of Education of the Monroe-Westbury School District and the Board of Education of Kiryas Joel Village School District. Those motions were granted by the court and a second amended complaint was served. By so-ordered stipulation, the action was discontinued against the State defendants with the recognition that the Attorney General would continue to appear in

support of the constitutionality of the statute (Executive Law, section 1). Presently, plaintiffs have moved for summary judgment seeking a declaration that Chapter 748 is unconstitutional. The Attorney General and the party-defendants have all cross-moved for summary judgment seeking a declaration of constitutionality.

The legislation which has generated the present controversy is straightforward. It provides that:

"The territory of the Village of Kiryas Joel in the Town of Monroe, Orange County, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel Village School District and shall have and enjoy all of the powers and duties of a union free school district under the provisions of the Education Law."

Section (2) of the legislation provides for the newly created District to be under the control of a Board of Education composed of between five and nine members elected by the qualified voters of the Village of Kiryas Joel. Finally, the bill provides that the terms of members of the school board shall not exceed five years. Plaintiffs assert that this act violates the Establishment Clause of the First Amendment to the United States Constitution and its New York State counterpart (Article XI, section 3).

Plaintiffs, individually, have standing to maintain this litigation. It is without doubt that encouraging individual citizen taxpayers "to take an active, aggressive interest in his state . . . [is] the classical means for effective scrutiny of legislative and executive action." (*Boryszewski v Brydges*, 37

NY2d 361, 364). "[A] citizen or taxpayer has the right to challenge in the courts, as unconstitutional, acts of government" (*Wein v Carey*, 41 NY2d 498, 500-501). Further, with respect to the New York State School Boards Association, said Association has very recently litigated similar questions, as a party plaintiff, without any question by either the other litigants or the judiciary concerning its standing to maintain the action. (*New York State School Boards Ass'n v Sobol*, N.Y.A.D. 3 Dept. 570 N.Y.S. 29, 716). Accordingly, the Appellate Division was satisfied that said Association had standing to litigate the issues before it. In this regard, the Appellate Division has determined that the issue of standing must be decided as a threshold issue before deciding constitutional challenges. (See: *County of Rensselaer v Regan*, A.D. 3 Dept., December 31, 1991).

Turning to the merits, the Court of Appeals has recognized that "[w]hile the principle of separation of Church and State is deep-rooted, . . . [t]here is no litmus test for determining which services may be rendered by a public body to parochial school students and which may not" (*Board of Educ. v Wider*, supra, p 189, footnote 3). In illustrating that principle, the court cited *Wolman v Walter*, (433 US 229), indicating that the decision had "so many categories and splintered votes that it can only read with a scorecard." (*Ibid*).

The leading and most-oft cited case upon the issues of separation of Church and State is *Lemon v Kurtzman*, (403 US 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745). Therein, the Supreme Court wrote that "[j]udicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." (p 164). The Court determined that

legislation, such as that challenged herein does not violate the Establishment Clause if it has a secular purpose, has the principle or primary effect of neither advancing nor inhibiting religion, and does not foster an excessive entanglement with religion. Legislation which gives the appearance of providing a significant symbolic benefit to religion "by reason of the power conferred" (*Larkin v Grendal's Den*, S.Ct. 505, 511, 74 L.Ed 2d 297), will not pass constitutional muster.

In applying the three-pronged test of *Lemon*, (supra), it becomes evident that the challenged statute violates all three. First, it has a sectarian rather than a secular purpose. There is no doubt that the legislation was an attempt by the Executive and Legislature to accommodate the sectarian wishes of the citizens of Kiryas Joel by taking the extraordinary measure of creating a governmental unit to meet their parochial needs.

The statute rather than serving a legitimate governmental end, was enacted to meet exclusive religious needs and has the effect of advancing, protecting and fostering the religious beliefs of the inhabitants of the school district.

The residents of the Village of Kiryas Joel have unequivocally refused and rejected any attempts to provide for the education of handicapped pupils from the Village at a neutral site previously offered by the Monroe-Woodbury School District. The present site can hardly be described as neutral. Rather, it lies squarely within the borders of a religious community, whose articulated goal is to remain segregated from the rest of society. Labeling the Village as a "union free public school district" cannot alter reality.

The Village of Kiryas Joel and the coterminous school district is an enclave of segregated individuals who share common religious beliefs which shape the social, political and familial mores of their lives from cradle to grave. "We want to be separate. It's intentional." (*Parents Association of P.S. 16, et al v Quinones*, 803 F.2d 1235, 1238). In fact, this school district was created solely and exclusively to meet religious needs. Such a law clearly violates the establishment of religion clause of both the State and Federal Constitution. The establishment of a governmental unit, in this case, a school district, constitutes a most direct affront to the establishment clause. The legislation is an attempt to camouflage, with secular garments, a religious community as a public school district.

Said legislation also fosters excessive entanglements with religion. As the Commissioner of Education, Thomas Sobol, states in his affidavit, the Kiryas Joel Village School District is a dependent school district within the Orange-Ulster supervisory district and is a component district of the Orange-Ulster Board of Cooperative Educational Services. His affidavit also makes it clear that Boards of Education of dependent school districts may not appoint their own superintendents without express recommendation of the Executive Officer of the Supervisory District. Further, the Commissioner's affidavit outlines the extent to which the State Education Department must take special steps to monitor the newly created school district to ensure that public funds are not expended to further religious purposes. He concludes that his staff "in its monitoring capacity is unavoidably entangled in matters of religion." (Sobol affidavit, par. 12).

The intent of the Legislature and Executive to be responsive to the citizens of Kiryas Joel is laudatory and

reflects the political process straining to meet the parochial needs of a religious group. However, their action violates the First Amendment which prohibits legislation which promotes the establishment of religion. The Satmar Hasidic sect enjoys religious freedom as guaranteed by the very First Amendment that they are now seeking to circumvent. This short range accomplishment could in the long run, jeopardize the very religious freedom that they now enjoy.

The strength of our democracy is that a multitude of religious, ethnic and racial groups can live side by side with respect for each other. The uniqueness of religious values, as observed by the Satmar Sect, is especially to be admired as non-conformity becomes increasingly more difficult to sustain, however, laws cannot be enacted to advance and endorse such parochial needs in violation of our deep-rooted principle of separation of Church and State.

For the reasons hereinabove set forth, plaintiffs' motion for summary judgment shall be granted. The cross-motion by the Attorney General and the party-defendants for summary judgment, seeking a declaration of constitutionality shall be denied. Plaintiff shall be directed to submit an order and judgment which declares that Chapter 748 of the Laws of 1989 violates the Establishment Clause of the First Amendment to the United States Constitution and its New York State counterpart, Article XI, section (3). All papers are being returned to counsel for plaintiff, who shall submit an order in conformance herewith, with a copy of this decision annexed.

DATED: January 22, 1992

Albany, New York

APPENDIX D

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. GEORGE BUNDY SMITH,
Associate Judge

-----X
Louis Grumet, &c., et al.,
Respondents,

ORDER

-v-

Board of Education of the Kiryas
Joel Village School District, et al.,
Appellants.

-----X

On reading and filing an application for a stay and the supporting affirmation and memorandum of law of Lisa D. Burget, Esq., counsel for appellant Board of Education of the Kiryas Joel Village School District, dated July 12, 1993, the application for a stay and the affirmation in support thereof of Lawrence W. Reich, Esq., special counsel to appellant Board of Education of the Monroe-Woodbury Central School District, dated July 12, 1993, the affidavit in support thereof of Julie S. Mereson, Esq., Assistant Attorney General, counsel for Attorney General Robert Abrams, appearing in this proceeding pursuant to Executive Law §71, dated July 13, 1993, the affidavit and memorandum in opposition thereto of Jay Worona, Esq., counsel for respondents, dated July 15, 1993, the affidavit in opposition thereto of Thomas Sobol, Commissioner of Education of the State of New York,

dated July 15, 1993, the affidavit in opposition thereto of Gregory Illenberg, Chief of the Bureau of State Aided Programs, New York State Education Department, dated July 14, 1993, the reply affirmation in support of the application for a stay of Neil M. Block, Esq., associate of Lawrence W. Reich, Esq., special counsel to appellant Board of Education of the Monroe-Woodbury Central School District, dated July 18, 1993, the memorandum of the Board of Education of the Kiryas Joel Village School District in reply to respondents' opposition, dated July 19, 1993, the reply affidavit in support of the application for stay of Steven M. Benardo, Superintendent of Schools for the Kiryas Joel Village Union Free School District, dated July 19, 1993, and upon all papers and proceedings heretofore had herein and due deliberation having been had thereon, and notice having been given to respondents, it is

ORDERED, that the July 15, 1993 oral order of this court extending the stay pursuant to CPLR §5519 (a), pending a determination of this application, be and the same is hereby vacated, and it is

ORDERED, that the application for a stay of the July 6, 1993 determination of the Court of Appeals in this matter, pending the filing of an application to the United States Supreme Court for a writ of certiorari, be and the same is hereby denied.

DATED: New York, New York
July 19, 1993

/s/
Associate Justice

APPENDIX E

ORDER LIST

MONDAY, JULY 26, 1993

ORDER IN PENDING CASE

A-71 BOARD OF EDUCATION OF THE KIRYAS JOEL
VILLAGE SCHOOL DISTRICT V. LOUIS GRUMET,
ET AL.,

A-72 BOARD OF EDUCATION OF THE MONROE-
WOODBURY CENTRAL SCHOOL DISTRICT V.
LOUIS GRUMET, ET AL.,

The applications for stay of the judgment of the Court of Appeals of New York, case No. 120 presented to Justice Thomas and by him referred to the Court are granted pending the timely filing and disposition by this Court of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

APPENDIX F

STATE OF NEW YORK

8747

1989-1990 Regular Sessions

IN ASSEMBLY

June 21, 1989

Introduced by COMMITTEE ON RULES -- (at request of M. of A. Lentol, Pataki) -- read once and referred to the Committee on Education

AN ACT to establish a separate school district in and for the village of Kiryas Joel, Orange county

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The territory of the village of Kiryas Joel in the town of Monroe, Orange county, on the date when this act shall take effect, shall be and hereby is constituted a separate school district and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law.

§ 2. Such district shall be under the control of a board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.

§ 3. This act shall take effect on the first day of July next succeeding the date on which it shall have become a law.

EXPLANATION - Matter in italics (underscored) is new; matter in brackets [] is old law to be omitted.

APPENDIX G

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

JOSEPH R. LENTOL
50th District
Kings County

Chairman
Committee on Government
Employees

PLEASE REPLY TO
District Office:
619 Lorimer Street
Brooklyn, New York
11211
(718) 383-7474

Member
Ways & Means
Committee
Judiciary Committee
Ethics & Guidance
Committee
Codes Committee
Rules Committee

Albany Office:
Room 621 L.O.B.
Albany, New York 12248
(518) 455-4577

July 7, 1989

Dear Governor Cuomo:

I write regarding Assembly Bill 8747 which establishes a new union free school district in Orange County. This legislation ends years of legal battles between the Monroe-Woodbury School District and the residents of the village of Kiryas Joel over how to provide

state funded special education programs to the Hasidic children of the county.

The hasidic jewish community hold firmly to its religious tenets. With the enactment of this legislation, bureaucratic entanglements that have prevented the delivery of special education programs to the hasidic kids of the village of Kiryas Joel will end.

In an honest attempt to create access for a group of children, the Monroe-Woodbury School Board voted unanimously in favor of this bill; and the local newspaper in an eloquent editorial acknowledged efforts by all parties to try to solve the problem and, therefore, wholeheartedly offered its support.

As the Assembly sponsor of this legislation, I urge you to grant Executive approval to this legislation. I have enclosed additional information for your review. If you have additional questions, please contact me in my Brooklyn office.

Sincerely,

/s/

Joseph R. Lentol

Governor Mario Cuomo
Executive Chamber
State Capitol
Albany, NY 12224

APPENDIX H

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

MEMORANDUM filed with Assembly Bill Number 8747,
entitled:

"AN ACT to establish a separate school district in
and for the village of Kiryas Joel"

CHAPTER 748
APPROVAL # 58
A P P R O V E D

The bill establishes a separate school district for the village of Kiryas Joel located in the town of Monroe, Orange County. The district is placed under the control of a board of education composed of from five to nine members. It is regarded by opponents and proponents alike as a practical solution to what has been, so far, an intractable problem.

Lawyers for the State Education Department argue that the bill may be held to be unconstitutional. My Counsel disagrees and advises that the bill is, on its face, constitutional. I am persuaded by my Counsel's view.

The bill is an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, whose population are all members of the same religious sect. Almost all of the approximately 3,000 school age children of Kiryas Joel attend private religious schools. However, the village has

sought to obtain from the public school district special education services for handicapped children.

Under our Constitution as interpreted by the Supreme Court of the United States such special education services may not be provided at the religious school but may be provided at a neutral site that is not a public school.

There came a time when the school district refused to provide such services to the handicapped children of Kiryas Joel at a neutral site and instead insisted that the children receive the services at a public school. The parents of these children sent them to the public school for a brief period but ultimately refused to continue to do so.

Litigation arose and our Court of Appeals held that the school district could not be compelled to provide special education services at a neutral site. As a result, the approximately 100 handicapped students in the village are not now receiving the special education services they need.

I believe that this bill is a good faith effort to solve this unique problem. And, as noted above, I am advised it is facially constitutional. Of course this new school district must take pains to avoid conduct that violates the separation of church and state because then a constitutional problem would arise in the application of this law. The village officials acknowledge this responsibility. I believe they will be true to their commitment.

The village of Kiryas Joel, the Monroe-Woodbury Central School District and the Orange County Executive recommend approval.

The bill is approved.

- against -

Defendants.

AFFIDAVIT

Index No.
1054-90
RJI No.
01-90-021649

Assigned
Justice:
Hon. Lawrence
E. Kahn

STATE OF NEW YORK)
COUNTY OF ORANGE) s.s.:

PHILIP R. PATERNO, being duly sworn,
deposes and says:

1. I am Director of Pupil Personnel Services for the Monroe-Woodbury Central School District, a defendant herein, and in such capacity I am personally familiar with the practices and procedures of the Kiryas Joel Village School District.

2. Prior to the creation of the Kiryas Joel Village School District, the Monroe-Woodbury Central School District was responsible for providing programs and services to the handicapped students residing within the Incorporated Village of Kiryas Joel.

3. As Chairperson of the Monroe-Woodbury Committee on Special Education, I am generally familiar with the needs and abilities of many of the handicapped students currently being educated at the Kiryas Joel Village School District.

4. In addition, the Monroe-Woodbury Central School District currently contracts with the Kiryas Joel Village School District for the education of four handicapped children residing with the Monroe-Woodbury Central School District whose needs are such that they cannot be met within the framework of the District's own special education program.

5. I have visited the Kiryas Joel Village School District on numerous occasions, and I wish to share my observations of the School with the Court.

6. The Kiryas Joel Village School is housed in a separate facility which is not physically proximate to any synagogue or religious institution within the underlying

community.

7. On each visit to the School, I observed no sectarian indicia on the building itself or on the walls or in the classrooms themselves of the School.

8. I observed direct instruction being given by secularly-dressed teachers to mixed classes of male and female students.

9. I observed that English was being utilized as the primary language of instruction.

10. I observed that female teachers were teaching male students.

11. I observed that the curriculum materials were secular and non-religious in nature.

12. I did not observe the teaching of any religious subjects, nor did I observe male students being treated differently from female students for instructional purposes, other than as necessitated by the nature or severity of their individual handicapping conditions.

13. As the school district official responsible for special education within the Monroe-Woodbury Central School District, I wish to make the Court aware of the fact that the four Monroe-Woodbury students who are contracted to be educated by the Kiryas Joel Village School District have handicapping conditions which cannot in my judgment be met within the less restrictive environment of a "mainstream" educational program with non-handicapped pupils.

14. I believe that the special class conducted by the Kiryas Joel Village School District constitutes the least

restrictive educational environment to meet their special needs, consistent with the requirements of state and federal law.

15. I am advised, and I have observed, that the Kiryas Joel Village School District has a dual enrollment program pursuant to the provisions of Education Law, §3602-c, pursuant to which resident nonpublic school students can attend the Kiryas Joel Village School for special education programs and services in addition to their nonpublic school programs.

16. Such children, generally requiring less intensive special education services, provide an environment where children in the special class may mix with significantly less-impaired students from the dual enrollment program during portions of the school day.

17. Since the Kiryas Joel Village School District is a public school district, the Monroe-Woodbury Central School District is permitted by law to contract with it for the education of children with handicapping conditions.

18. I regard the school as a secular institution, staffed by public employees performing the public function of educating children.

/s/
PHILIP R. PATERNO

Sworn to before me this
18th day of June, 1991

/s/
NOTARY PUBLIC

APPENDIX J

STATE OF NEW YORK

SUPREME COURT COUNTY OF ALBANY

LOUIS GRUMET, individually
and as Executive Director
of the New York State School
Boards Association, Inc.,;
ALBERT W. HAWK, individually
and as President of the
New York State School
Boards Association, Inc.,
and the NEW YORK STATE
SCHOOL BOARDS
ASSOCIATION, INC.,

Plaintiff,

- against -

BOARD OF EDUCATION OF
KIRYAS JOEL VILLAGE
SCHOOL DISTRICT;
BOARD OF EDUCATION OF
THE MONROE-WOODBURY
CENTRAL SCHOOL
DISTRICT,

Defendants.

AFFIDAVIT
of
DR. STEVEN M.
BENARDO

Index No.
1054-90
RJI No.
0190-021649
Lawrence E.
Kahn, Jr.

STATE OF NEW YORK)

) ss:

COUNTY OF ORANGE)

STEVEN M. BENARDO, being duly sworn,

deposes and says:

1. Since on or about July 1, 1990, I have been the Superintendent of Schools for the Kiryas Joel Village School District in Orange County, New York ("School District"). In that position, I personally oversee and am responsible for the day-to-day operations of the School District. On or about January 1, 1991, the positions of superintendent and principal of the School District's public school were consolidated, and since then I have held that joint position as a full-time employee of the School District. The Kiryas Joel Board of Education authorized that consolidation of positions in recognition of the need for a full-time administrator to meet the regulatory and educational objectives of both the Kiryas Joel Board of Education and the New York State Department of Education.

2. The facts set forth herein are based on my personal knowledge, and I would testify to the same in any trial of this action.

3. As more fully set forth in my resume, a true and correct copy of which is attached as Exhibit 1 to this Affidavit, prior to assuming my current full-time position with the School District I worked in the New York City Public School System for over twenty years and have over ten years of direct experience in the field of special education for handicapped children.

4. From January 1983 until January 1, 1991, I held the position of Deputy Assistant Superintendent, Division of Special Education, in the Bronx region of New York City. In that capacity I was responsible for the

monitoring and the provision of technical support for instructional services, and the delivery of clinical services to over 30,000 students in 186 schools in the borough of the Bronx.

5. I hold licenses issued by the City of New York Board of Examiners and the Department of Education for the State of New York in general education (non-handicapped), bi-lingual education and special education. I also hold licenses as an elementary school principal, junior high school principal, and special education principal. Further, I hold a school district administrator certificate. I am unaware of anyone in the State of New York who has supervised a greater number of bilingual special education classes than I have supervised.

6. I have special experience and expertise in the area of bilingual-bicultural education and bilingual-bicultural education for handicapped children. In my capacity as Deputy Assistant Superintendent within the City of New York, under the direction of the Chancellor, I chaired the Task Force for the Development of Policies, Practices and Procedures for bilingual special education. The Task Force generated a one-volume text of approximately 200 pages that has served as the foundation for all assessment services and instructional programs for all limited English proficient students with handicapping conditions for student grades kindergarten through twelve. In addition, I represented the New York Board of Education in connection with litigation (Jose P. v. Ambach, 557 F. Supp. 1230 (E.D.N.Y. 1983)) involving the need to provide bilingual-bicultural educational services to handicapped Hispanic children.

7. My education up to and including my Masters Degree was received exclusively at public schools and

universities. I hold a E.Ed in Educational Policy and Administration from Fordham University, and have served in numerous university teaching positions as more fully described in my attached resume.

8. I am not a member of the Satmar Hasidic community or any other Orthodox Jewish group. During my employment interviews by the Kiryas Joel Board of Education I was never questioned about my religious affiliation or religious practices.

9. All of the teachers and therapists working within the School District's public school are appropriately licensed under the terms and conditions established by the Department of Education. None of the teachers live in the Village of Kiryas Joel or currently teach in religious schools. They were hired without regard to their religion, race or ethnic origin.

10. Based upon my experience as an educator, professor, lecturer, and administrator, it is my opinion that the teachers, therapists and community relations staff of the School District are superbly qualified for their positions. The curriculum designed by the public school's faculty and administrators is congruent with the general provisions of the regulations of the Commissioner of Education. There has not been a single concern raised with me by any representative of the State Education Department regarding the licensure of teachers, therapists or administrators, the scope or content of the curriculum, or the balance between English-language instruction and instruction of the students' native language. I was recently informed by the Director of Bilingual Education Training and Assistance of the New York State Department of Education, whose office is in Ulster County, that there is no bilingual special education

program in the eight counties serviced by their technical assistance center other than the program offered by the Kiryas Joel School District.

11. The School District's public school building is located at a site which is not adjacent to any synagogue, religious school or other religious institution or structure. There are no religious symbols or artifacts anywhere in the public school building, on the walls or in the classrooms. For example, in the private, religious schools in the Village of Kiryas Joel there is a small piece of parchment, known as a mezuzah, affixed to the frame of the door to every classroom and office as a symbol of the Jewish faith. In the public school in Kiryas Joel, however, there is no mezuzah anywhere. In my opinion, in all regards there exists no discernible difference between this public school facility and any other facility that I have previously supervised during my over 20 years in education.

12. The School District has an entirely secular program of instruction and provides no religious training whatsoever. The program of instruction has been designed and approved in exactly the same manner as in any other public school district in New York.

13. The School District's school calendar is similar to that of other public schools in New York, and (as with the School District's curriculum, licensure, and facility planning) the school calendar was reviewed and approved by the Department of Education before it was implemented, as is required for every school district.

14. The School District provides instruction by both male and female teachers. Its teachers and therapists provide instructional and therapeutic services to

mixed classes of male and female students. Male employees report to female supervisors, and female employees report to male supervisors. There is no dress code for staff or students and both staff and students dress in a secular fashion.

15. The School District uses secular textbooks and other curriculum material that are non-religious in nature.

16. The School District provides instruction in secular music and physical education.

17. The School District uses English as the primary language of instruction while also providing educationally appropriate bilingual and bicultural instruction. Based on my experience and personal knowledge, the bilingual-bicultural services provided by the School District are of the same nature and degree as the bilingual-bicultural services provided to other groups (e.g. Hispanics and Asians) in other school districts in New York.

18. The School District, like many other schools serving children with a native language and culture of a minority group, offers secular activities associated with the cultural holidays of the minority group as well as traditional holidays of the majority culture. I am aware that such secular educational activities are allowed even if the holiday in question has both secular and religious significance so long as the school activity is "presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday." Florey v. Sioux Falls School Distr., 619 F.2d 1311, 1314 (8th Cir. 1980); see also Matter of Sheldon Rosenbaum, 28 ED Dep't Rep. 138 (1988) (following

Florey rule). For example, during the past school year the School District provided secular activities associated with such holidays as Thanksgiving and Martin Luther King's Birthday, as well as Chanukah.

19. It was in the context of such a holiday activity that a group of three and four year old, retarded students watched the lighting of menorah candles in a classroom of the public school this past December. This activity was used as an opportunity to provide instruction in counting and height awareness, two important concepts for that age group, and to note a holiday of particular interest to the children's minority culture. No religious blessing was said in the classroom and no religious instruction was provided. Contrary to the inaccurate statements in paragraph 19 of the Affidavit of Hannah Flegenheimer submitted in this case, "photographs" of this holiday activity were not placed "on the walls of a preschool classroom." In fact, a single, three inch by five inch photograph of this entirely appropriate holiday activity was placed at one time on a bookshelf in the classroom. After I became aware of the objection, I searched the classroom and found the photograph resting on its face and removed it.

20. Although the Department of Education apparently observed the photograph during a site visit, I was not informed of any objection by the Department. I did, however, become aware of the objection when I read Ms. Flegenheimer's affidavit in this litigation. This inappropriate means of communicating a concern about the operation of the School District was personally distressing to me because I have made diligent efforts to elicit from the Department of Education any concerns it might have in this regard. At the conclusion of every one of the numerous visits to the public school, announced

and unannounced, by officials of the Department of Education, I have asked whether they found any inappropriate religious symbols in the school. Each time, the official from the Department of Education responded that none have been found.

21. The School District is currently providing special education services to 76 students and expects to provide such services to over 100 students during the next school year.

22. The School District has accepted numerous non-Satmar students whose language and cultural needs could not be met by their resident school districts. This determination was not made by the Kiryas Joel School District but by the school district of the child's residence. In every such instance, this School District was solicited to provide otherwise unavailable bilingual and bicultural services. For example, one handicapped student was accepted who is not Hasidic but whose primary language is Yiddish and could not be given an appropriate education in his resident school district which lacked the necessary bilingual services. That transfer was expressly approved by the Department of Education as in the educational interest of the child.

23. In the Village of Kiryas Joel there is a significant minority population (over 5 percent) of Spanish-speaking families that originate from Argentina. Some of the children of this minority population have been referred to the School District for assessment of their handicapped conditions.

24. In accordance with federal and state educational requirements, every handicapped child served by the School District is currently receiving the opportunity

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to interact with non-handicapped peers (i.e. mainstreaming) to the extent such interaction is called for by that child's individual education plan.

/s/
STEVEN M. BENARDO, E.Ed

Subscribed and sworn to before
me this 21 day of June, 1991.

/s/
Notary Public

(2) (2) (2)
No. 93-517, 527, 539

Supreme Court, U.S.

FILED

OCT 29 1993

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL
VILLAGE SCHOOL DISTRICT,

Petitioner,

v.

LOUIS GRUMET AND
ALBERT W. HAWK,

Respondents.

[Caption Continued On Inside Cover]

On Petition For A Writ Of Certiorari
To The New York State Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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BOARD OF EDUCATION OF THE MONROE-
WOODBURY CENTRAL SCHOOL DISTRICT,

Petitioner,

v.

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

THE ATTORNEY GENERAL OF THE
STATE OF NEW YORK,

Petitioner,

v.

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

Counterstatement of Question Presented

Whether the New York State Court of Appeals correctly held that Chapter 748 of the Laws of 1989 entitled an act to establish a separate school district in and for the Village of Kiryas Joel, Orange County, violates the Establishment Clause of the First Amendment of the United States Constitution?

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RESPONDENTS' BRIEF IN OPPOSITION

Jurisdiction

This Court's jurisdiction is discretionary, under 28 U.S.C. §1257(a).

Summary of Argument

Respondents respectfully request that the Court deny the petition for a writ of certiorari, which seeks a review of a decision of the New York State Court of Appeals holding that Chapter 748 of the Laws of 1989 of New York State violates the Establishment Clause of the First Amendment to the United States Constitution.

The decision below correctly invalidated the statute under the principles enunciated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and this Court's Establishment jurisprudence. The statute represents an excessive and constitutionally impermissible accommodation of religious beliefs. The unique facts of the case make it an inappropriate vehicle for revisiting the *Lemon* test. The issues have been fully and correctly resolved by New York's highest court. Review by this Court is therefore unnecessary.

Counterstatement of the Case

This is a facial Establishment Clause challenge to Chapter 748 of the Laws of 1989 of the State of New York ("Chapter 748") which provides for the formation and existence of a publicly funded school district for the

Village of Kiryas Joel ("the Village") for the purpose of providing an exclusive environment in which that community can educate its children with disabilities in accordance with Satmar religious precepts of exclusivity¹. Claims the school district is presently operating in a secular manner constitute an "as applied" argument not properly before this Court.

Prior to the establishment of a separate school district for the residents of the Village, special education and related services were always available and offered to the children of Kiryas Joel within the public school facilities of petitioner Monroe-Woodbury Central School District ("Monroe-Woodbury"), the school district to which the residents of the Village of Kiryas Joel belonged before the Kiryas Joel Village School District ("KJVSD") was created.² However Village residents requested and obtained

¹ Assertions by petitioner Kiryas Joel Village School District ("KJVSD") that there is no "religious tenet prescribing separatism" (KJVSD Petition, p.5, fn 1) are unsupported by the record, and were raised by the KJVSD for the first time during oral argument before the Court of Appeals. They are also contrary to judicial finding in previous cases involving the Satmar community. (*Parents' Assn. of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986); *Bollenbach v. Bd. of Educ. of the Monroe-Woodbury Central School Dist.*, 659 F.Supp. 1450, 1453 (SDNY 1987).

² That Monroe-Woodbury appears as a petitioner before this Court is immaterial to determining the constitutional validity of Chapter 748. Just as the benediction in *Lee v. Weisman*, ___ U.S. ___, 112 S. Ct. 2649 (1992), was unconstitutional despite the good faith efforts of the school to make it acceptable, the support of Monroe-Woodbury does not transform an otherwise unconstitutional accommodation of Satmar religious beliefs into permissible governmental action. As this Court explained in *Lee*, it is the legitimacy of the undertaking itself which determines a violation of the Establishment Clause. (*Lee*, *supra* at 2656).

from the New York State Legislature a separate school district because of their religious need to remain culturally isolated.

Although the KJVSD was allegedly established to provide services to approximately one hundred Kiryas Joel resident children with disabilities, in 1990, during the first school semester the KJVSD opened, only 33 pupils were enrolled in and receiving services from the district. Of these, 20 were non-residents of the Village, but all were Satmar Hasidim. Three of the non-resident students were residents of petitioner Monroe-Woodbury, 17 of the non-resident students were being bused from a school district in another county. During the 1992-93 school year, the KJVSD provided special education and related services on a full-time basis to only 13 resident students and 29 non-resident students. The district also offered services on a part-time basis to 95 resident students attending the Village's parochial schools, but the vast majority of those students were only receiving one (1) period of special education services per day. (Affidavits of Hon. Thomas Sobol, and Gregory Illenberg, previously submitted to this Court with respondents' opposition to petitioners' Application for Extension of Stay, and reprinted in the Appendix at App. 1 and App. 6, respectively).

About the Satmar Hasidim

The Satmar Hasidim who comprise the population of the Village of Kiryas Joel are members of an Orthodox Jewish sect. Satmar Hasidim believe in a literal interpretation of Scripture and the teachings of the Torah and

the Talmud (the book of Jewish law and tradition) which serve to guide every aspect of life from dress to diet. Central to Satmar Hasidic beliefs and way of life is the drawing of cultural boundaries between themselves and the rest of society. (Affidavit of Israel Rubin, reprinted in the Appendix at App. 13). To protect themselves against undesirable acculturation, Satmar Hasidim do not allow their children to attend school with children who belong to cultures deemed undesirable for Satmarers. (App. 17; *Parents' Assn. of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986)).

Hasidic sects, including the Satmar, are led by their own religious leader known as the Rebbeh, who is traditionally the most powerful and influential man in the Satmar community. The Rebbeh oversees almost every aspect of Hasidic life. (App. 15-16). Those questioning his authority risk expulsion from the community's congregation, and ostracism by the other community members. For instance, the only candidate running for the KJVSD board of education without the endorsement of the Rebbeh during the school district's first election was expelled from the Village's main congregation, and his children were expelled from the Village's religiously affiliated schools after this candidate refused to renounce his candidacy. (See, *Waldman v. United Talmudic Academy*, 147 Misc.2d 529 (1990); Record on Appeal to the Court of Appeals; pp. 407; 436-439; 470-480; 592-641).

About the Village of Kiryas Joel

The Village of Kiryas Joel is comprised of a culturally, ethnically and religiously isolated population. (*Board of*

Education of the Monroe-Woodbury CSD v. Wieder, 72 NY2d 174, 179 (1988)). In addition to separation from the outside community, Satmar religious beliefs also dictate separation of the sexes.³ (*Parents Assn. of P.S. 16 v. Quinones*, supra; *Bollenbach v. Board of Education of the Monroe-Woodbury Central School District*, 659 F.Supp. 1450 (SDNY 1987)).

Not unlike the creation of the KJVSD, the incorporation of the Village of Kiryas Joel followed heated and litigated controversy, at that time over the zoning code violations committed by builders constructing dwellings for the Satmarer in a subdivision located within the Town of Monroe. (Record on Appeal to the Court of Appeals, pp. 408-410; 517-525). Accusing the Town of persecuting Hasidic Jews, the Satmarer presented the Monroe Town Board with a self-incorporation petition, under the provisions of New York's Village Law. The incorporation of the new village allowed the Satmarer to avoid the Town of Monroe's zoning code and to enact their own zoning laws consonant with their specific requirements. (Record on Appeal to the Court of Appeals, p. 523).

³ Contrary to the implications of petitioners' assertions that KJVSD students are not separated by sex in accordance with Satmar beliefs, respondents have never asserted in support of their challenge to Chapter 748 that handicapped Satmar children must be separated by sex when they are receiving instruction. Indeed, the affidavit of Israel Rubin, a preeminent scholar on the Satmar community, indicates separation of the sexes is not necessarily required when handicapped Satmar children are being provided with educational instruction. (App. 19).

Prior Litigation Concerning Services to Satmar Hasidic Students

The constitutional problems inherent in the provision of publicly-funded educational and related services to Satmar children in a manner consistent with their religious beliefs and culture have been the subject of judicial review not only in the present case, but also in previous cases including one case before the New York State courts and two separate federal court cases.

In *Parents' Assn. of P.S. 16 v. Quinones* (803 F.2d 1235 (2d Cir. 1986)), the New York City Board of Education adopted a plan to close off nine classrooms of a public school and to dedicate the enclosed area to the exclusive use of Satmar Hasidic girls. (803 F.2d at 1237). The Second Circuit Court of Appeals found the plan to separate the Hasidic students **from all other public school students** was an unconstitutional accommodation of Satmar Hasidic religious beliefs and traditions. (803 F.2d at 1241). According to the *Quinones* court, the plan created a symbolic link between the state and the Hasidic sect which was likely to be perceived by the Hasidim and others as governmental support for the separatist tenets of the Hasidic faith. To impressionable young minds, the challenged plan would appear to endorse not only separatism but the derogatory disdain of the Hasidim for other cultures. (*Id.*)

The *Quinones* decision referenced statements by members of the Satmar community which reflect the intrinsic separatist position of that Hasidic community,

[the Satmar Hasidim] struggle very hard to maintain [their] belief and [their] culture . . . [They] want [their] children separate . . . The issue goes to the heart of the Orthodox tradition, which requires the separation of males and females for virtually every activity, including schooling, and encourages isolation from other cultures. If we have our kids learning with them, they'll be corrupted . . . We don't hate these people, but we don't like them. *We want to be separate. It's intentional.* (803 F.2d, *supra*, at 1238) (Emphasis added).

In *Bollenbach v. Bd. of Educ. of the Monroe-Woodbury Central School Dist.*, 659 F.Supp. 1450 (SDNY 1987), Monroe-Woodbury, responding to requests by Kiryas Joel residents, removed female bus drivers from transportation runs servicing the Village's male Hasidic students to their religious school after being advised that the male students could not board school buses driven by female drivers nor take their instructions because of Satmar religious tenets restricting interaction between the sexes. (659 F.Supp. at 1453). The United States District Court for the Southern District of New York determined that the assignment of only male drivers on runs servicing male Village students had the primary effect of advancing religious beliefs and created excessive entanglement of government with religion in violation of the Establishment Clause of the First Amendment to the United States Constitution. (659 F.Supp. at 1455-66).

In *Board of Education of the Monroe-Woodbury CSD v. Wieder*, 134 Misc.2d 658 (1987); 132 AD2d 409 (2d Dept. (1987)); 72 NY2d 174 (1988), the New York State courts specifically reviewed the issue of whether the Village

handicapped children were entitled to obtain publicly-funded special education and related services in an environment separate from non-Satmar students, in conformity with Satmar separatist beliefs and custom. Initially, Monroe-Woodbury provided the services at an annex to one of the Village's private schools (72 NY2d 174, 180). However, reacting to this Court's decisions in *Aguilar v. Felton* (473 U.S. 402 (1985)) and *School Dist. of City of Grand Rapids v. Ball* (473 U.S. 373 (1985)), Monroe-Woodbury determined it could no longer provide the services at the annex and proceeded to place the affected children in classes within its public schools, based on individual evaluations conducted by the Monroe-Woodbury Committee on the Handicapped (COH)⁴. Several months thereafter, the Village parents refused to permit their children to continue attending such schools, (72 NY2d at 180; 132 AD2d 412), **despite Monroe-Woodbury efforts to integrate the Satmar children into the public school environment and to accommodate the parents, including Yiddish-speaking aides and bilingual reports, and reports that the children who actually attended the programs in the public school facilities continued to progress.** (72 NY2d at 181).

New York State Supreme Court, Orange County, in its *Wieder* decision directed Monroe-Woodbury to provide the Village's children with disabilities with special education and related services at a location not physically or educationally identified with the Village but, nonetheless,

⁴ Pursuant to Chapter 642 §2 of the Laws of 1987, the term "Committee on the Handicapped" was replaced by the term "Committee on Special Education".

reasonably accessible to the parochial school children. (134 Misc.2d 658, 662-663). The Appellate Division, Second Department, reversed the lower court's decision, ruling, *inter alia*, that the ordering of services at a "neutral site" by the Orange County Supreme Court ran afoul of the Establishment Clause because,

the record demonstrates that in reality, the mobile unit or other facility will be provided for the use of the handicapped children of Kiryas Joel not because of the nature of their handicaps, but because of their Hasidic faith and sociocultural background . . . [and] their parents' desires to keep them out of the public schools and insulated from students of dissimilar religious and cultural backgrounds. (132 AD2d, *supra*, at 416; see, 72 NY2d, *supra*, at 188).

In so ruling, the Appellate Division, Second Department, expressly rejected the Village residents' reliance on this Court's decision in *Wolman v. Walter*, 433 U.S. 229 (1977), which case petitioners cite again in support of their petition for a writ of certiorari. The Appellate Division, Second Department, found, that in contrast to the legislative scheme upheld in *Wolman*, the remedy imposed by the Supreme Court, Orange County, was based on that court's "concern for the religious and social practices of the Hasidim" rather than upon a consideration of totally secular factors. (132 AD2d 415).

Reviewing the Appellate Division's *Wieder* decision, the New York Court of Appeals did not reach the constitutional issue limiting itself, instead, to interpreting whether New York State Education Law required Monroe-Woodbury to provide special education services to

the children of Kiryas Joel only in its public schools, or allowed it to provide the services at the Village's religious schools, or even at a neutral site. (72 NY2d at 189-90). Ruling that New York law required neither, the Court of Appeals noted "[it had] no occasion to . . . determine where particular services could be rendered in conformity with constitutional principles" because the action before it "pose[d] only the abstract question [of] whether services *must* be furnished in public schools . . . or *must* be furnished separately . . . " (72 NY2d at 189 fn 3). The Court of Appeals further noted, however, that on the record before it, "[the Village residents'] statutory entitlement to special services does not carry with it a constitutional right to dictate where they must be offered" (72 NY2d at 188).

Establishment of the Kiryas Joel Village School District

Subsequent to the Court of Appeal's *Wieder* decision, the New York State Legislature adopted Chapter 748 providing for the creation and maintenance of the KJVSD. This separate school district is entirely located within the Village of Kiryas Joel, (Record on Appeal to the Court of Appeals, p. 420), and was purportedly established exclusively to provide special education and related services to the children of the Village, with the non-handicapped student population "expected to continue to attend private schooling currently provided in the Village." (Record on Appeal to the Court of Appeals, p. 126).

However, the act itself attributes to the KJVSD "all the powers and duties of a union free school district under the provisions of the [New York] education law,"

which are vast and enable the district to provide services to nondisabled students, as well. (Record on Appeal to the Court of Appeals, p. 90; 81 NY2d 518, 537-538 (Kaye, J. concurring).) Indeed, during the pendency of the present case, the KJVSD submitted plans to the New York State Education Department of a facility it proposed to purchase to expand its instructional program to include regular kindergarten classes, (Affidavits of Hon. Thomas Sobol and Robert Lavery, submitted to the New York State Appellate Division in support of respondents' Motion to Vacate Statutory Stay, and reprinted in the Appendix at App. 20 and App. 23, respectively), even though memoranda contained in the statute's bill jacket also indicate that any non-handicapped student residing within the KJVSD desiring a public school program would be 'tuitioned out' to the Monroe-Woodbury school district. (Record on Appeal to the Court of Appeals, p. 126).⁵

As a full-fledged union free school district under New York State Education Law, the KJVSD is also responsible for providing the general non-handicapped student population attending the Village's religious schools with certain specific services such as textbooks, health and welfare services and transportation. The Village's parochial schools are part of the educational system established to provide education to Satmar students in a manner that preserves, in full, Satmar culture in America, and serve as the vehicle for inculcating in Satmar children the religious standards of their parents.

⁵ The KJVSD has placed these plans in abeyance pending final determination of this case.

Satmar religious schools "serve primarily as a bastion against undesirable acculturation, as a training ground for Torah knowledge in the case of boys, and in the case of girls, as a place to gather knowledge they will need as adult women." (*Board of Education of the Monroe-Woodbury CSD v. Wieder*, 72 NY2d at 180, citing *Rubin, Satmar: An Island in the City*, at 140 [Quadrangle 1972]; App. 17-18). Thus, education comes close to being an adjunct to religion. "English" or secular educational programs, are offered only as necessary to meet the minimum state requirements for qualifying as an approved school under the State's compulsory education laws. Textbooks are censored in advance, and the borrowing of public library books is forbidden because of their uncensored content. Nonacademic subjects such as art, music and physical education are absent from Satmar schools. (Record on Appeal to the Court of Appeals, pp. 494-496; App. 17-18).

In establishing the KJVSD as a full-fledged union free school district to exclusively provide educational services to Village children with disabilities, the New York State Legislature ignored warnings by counsel to the New York State Education Department, the state agency responsible for overseeing implementation of Chapter 748, that the establishment of the KJVSD contravened separate New York State statutory provisions which preclude union free school districts, such as the KJVSD, from operating separate schools solely for students with disabilities.⁶ (Record

⁶ The New York State Education Department was one of the original state defendants in this action. Pursuant to a stipulation and order of Supreme Court, Albany County (Kahn, Lawrence E., J.), dated August 21, 1990, the action was dismissed against

on Appeal to the Court of Appeals p. 102). The New York State Legislature also contravened the State's Master Plan for School District Reorganization in New York State which, pursuant to the New York State Education Law, promotes the reorganization and consolidation of smaller school districts to encourage economy and efficiency in the State's public education system. (Record on Appeal to the Court of Appeals p. 504).

The establishment of the KJVSD as a full-fledged union free school district is also in conflict with the provisions of Article 81 of the New York State Education Law which specifically authorize the establishment of "special act" school districts designed to provide education to children with disabilities exclusively. Unlike the KJVSD, "special act" school districts do not serve a general student population, and cannot refuse placement of nonresident handicapped children from other school districts. (Record on Appeal to the Court of Appeals, pp. 420-421).

the original state defendants, including the New York State Department of Education, the New York State Board of Regents, the New York State Comptroller and the District Superintendent for the Orange-Ulster Board of Cooperative Educational Services. The KJVSD and Monroe-Woodbury were added as party-defendants by order of Supreme Court, Albany County (Kahn, Lawrence E., J.), dated May 10, 1990. The New York State Attorney General continues to appear as a statutory defendant pursuant to the laws of New York State, albeit representing a position contrary to that of the State Education Department which has supported respondents' position throughout this litigation by submitting affidavits containing information relevant to the issues presented in this case.

Education of Children with Disabilities

The education of children with disabilities in New York State is governed by the Individuals with Disabilities Education Act (IDEA)⁷, 20 U.S.C. §1400 *et seq.* and its implementing regulations, 34 CFR Part 300 *et seq.*; the Rehabilitation Act of 1973, §504 (29 U.S.C. §§794-794(c)) and its implementing regulations at 34 CFR 99; and by Article 89 of the New York State Education Law, and its accompanying regulations, 8 NYCRR Part 200, as well as the general requirements applicable to all school districts as defined in Part 100 of the Commissioner's Regulations. Pursuant to these statutory and regulatory provisions, school districts are required to provide to children with disabilities a "free appropriate public education" in conformity with an "individualized education program" (IEP), tailored to meet the unique needs of the individual child, **defined in accordance with the child's specific disability.** (20 U.S.C. §§1400(c); 1401(18)). All students with disabilities are entitled to receive a free appropriate education in the district where they reside.

Both federal and state law require that educational services be provided in the "least restrictive environment," appropriate to the needs of the student. (20 U.S.C.

⁷ The Individuals with Disabilities Education Act (IDEA) was formerly known as The Education of the Handicapped Act (EHA), Pub. L. No. 91-230, 84 Stat. 121. Along with the title change pursuant to amendments dated October 30, 1990, and codified at 20 U.S.C. §§1400-1485, the term "children with disabilities" was substituted for the term "children with handicapping conditions."

§1412(5)(B); 34 CFR 300.550(b); 8 NYCRR 200.6(a)(1)). This requires that "special classes, separate schooling, or other removal of handicapped children from the regular educational environment . . . occur only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." (20 U.S.C. §1412(5)(B); 34 CFR 300.550(b)(2); 8 NYCRR 200.6(a)(1); 8 NYCRR 200.1)). The inquiry is whether the goal of the IEP can be met within a regular education program with supplementary aids and services. (*Id.*). Therefore, it is a violation of state and federal law to remove a pupil from regular classroom instruction unless it is determined that, even with support services, the child would not benefit from instruction in the regular classroom. In addition, students who cannot benefit from instruction in a regular classroom, must, nonetheless, be afforded the opportunity to interact with their non-handicapped peers in nonacademic areas, i.e., recess, lunch, music, art, gym, etc. (34 CFR 300.550(b)(2); 8 NYCRR 200.1(t)(1)(2)).

There is no indication that the entire student population of the KJVSD is incapable of benefitting from regular classroom programs with the use of supplementary aids and services. Because the KJVSD was purportedly established to educate only students with disabilities, it is by design unable to provide its students with disabilities the opportunity to be placed in regular education classes with non-handicapped children, or to interact in non-academic areas with their non-handicapped peers. (Record on Appeal to the Court of Appeals at p. 512).

The Decisions Below

Respondents commenced an action in New York State Supreme Court, Albany County, seeking a declaration that Chapter 748 was constitutionally infirm under both the Federal and State Constitutions. Applying the tripartite test established by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the lower court ruled the statute violated all three prongs of that test. In its decision, the lower court further noted that:

[t]he intent of the Legislature and Executive to be responsive to the citizens of Kiryas Joel is laudatory and reflects the political process straining to meet the parochial needs of a religious group. However, their action violates the First Amendment which prohibits legislation which promotes the establishment of religion. The Satmar Hasidic sect enjoys religious freedom as guaranteed by the very First Amendment that they are now seeking to circumvent. This short range accomplishment could in the long run jeopardize the very religious freedom which they now enjoy. (*Grumet v. New York State Education Dep't.* 151 Misc.2d 60, 65 (1992)).

Affirming the ruling of the lower court, the Appellate Division, Third Department, determined that:

[t]he challenged statute . . . was designed not merely to provide special education services to the handicapped children of the Village, but to provide those services within the Village, so that the children would remain subject to the language, lifestyle and environment created by the community of Satmarer Hasidim and avoid mixing with children whose language, lifestyle and environment are not the product of that religion.

The dissent finds a secular purpose for the statute in that it would provide the handicapped children of the Village with the publicly supported, secular special educational services they need and to which they are entitled, but as previously noted those services were already available to all of the handicapped children of the Monroe-Woodbury District, including the handicapped children of the Village. Thus, the only secular need for the statute recognized by the dissent, did not, in fact, exist. (*Grumet v. Board of Educ. of the Kiryas Joel Village School Dist.*, 187 AD2d 16, 21 (1992).)

The Appellate Division further held that the statute violated the second prong of *Lemon* because of the inherent

symbolic impact of creating a new school district coterminous with a religious community to provide educational services that were already available in an effort to resolve a dispute between the religious community and the school district within which the community was formally located, a dispute based upon the language, lifestyle, and environment of the community's children created by the religious tenets, practices and beliefs of the community . . . The record . . . contains uncontradicted evidence of a direct link between the language, lifestyle and environment of the community's children and the religious tenets, practices and beliefs of the community. (187 AD2d at 25).

Having concluded the statute violated the first and second prong of *Lemon*, the Appellate Division saw no need to address whether the statute also violated the third prong. (187 AD2d at 23).

In the decision below, the New York State Court of Appeals similarly determined that:

[b]ecause special services are already available to the handicapped children of Kiryas Joel, the primary effect of Chapter 748 is not to provide those services, but to yield to the demands of a religious community whose separatist tenets create a tension between the needs of its handicapped children and the need to adhere to certain religious practices. Regardless of any beneficent purpose behind the legislation, the primary effect of such an extensive effort to accommodate the desire to insulate the Satmarer and Hasidic students inescapably conveys a message of governmental endorsement of religion. Thus, a core purpose of the Establishment Clause is violated. (*Grumet v. Board of Educ. of the Kiryas Joel Village School Dist.*, 81 NY2d 518, 531 (1993)).

In so ruling, the Court of Appeals expressly rejected

the dissent's assertion that 'no message of endorsement for Satmar theology or its particular separatist tenets * * * can fairly be inferred' (dissenting opn. at 553) from a statute that creates a new school district within an existing school district and establishes a board of education, composed entirely of residents of the Village of Kiryas Joel who are of the Satmarer Hasidic religious sect. Here, unlike in *Zobrest* (supra) the statute creating a school district and establishing a board of education coterminous with the Satmarer Hasidic Village of Kiryas Joel cannot be viewed as part of a general government program. Rather, as stated, the statute represents a long-standing conflict between the

Monroe-Woodbury School District and the Village of Kiryas Joel, whose population are all members of the same religious sect. Thus, it cannot be said that by the creation of the Kiryas Joel Village School District, the government is offering 'a neutral service * * * as part of a general program that is "in no way skewed towards religion" '. (81 NY2d at 530).

Having concluded that the second prong of *Lemon* was violated, the Court of Appeals determined it need not address the first or third prong of *Lemon*. (81 NY2d at 531).

Reasons for Denying the Writ

1. The decision of the New York State Court of Appeals is consistent with this Court's Establishment Clause jurisprudence.

A. *Lemon v. Kurtzman*

Chapter 748 of the Laws of 1989 was declared unconstitutional by the court below, as "convey[ing] a message of governmental endorsement of religion," in violation of a core purpose of the Establishment Clause. *Grumet v. Board of Educ. of the Kiryas Joel Village School Dist.*, 81 NY2d 518 (1993). The New York State Court of Appeals grounded its decision on the principles enunciated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Although often maligned, this Court has not overruled its tripartite test established in *Lemon* for determining the constitutionality of governmental action under the Establishment Clause. The Court of Appeals properly relied upon and correctly applied the *Lemon* test.

To survive constitutional scrutiny under *Lemon*, legislation must, 1) have a secular purpose; 2) have a principal or primary effect that neither advances nor inhibits religion; and 3) neither may it foster an excessive governmental entanglement with religion. The Court of Appeals below properly determined that Chapter 748 failed the second prong of *Lemon* which concerns itself with whether "irrespective of [its] actual purpose, [governmental action] in fact conveys a message of endorsement of religion" (*Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)); (See, *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 49 U.S. 573, 57 USLW 5045, 5050 (1989) citing *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 389 (1985); *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J. concurring); *Parents' Assn. of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986)). Moreover, although not addressed by the Court of Appeals, Chapter 748 also fails the first and third prong of *Lemon* for the reasons set forth in the two lower court decisions, as well as the concurring opinion of Judge Hancock at the Court of Appeals (81 NY2d at 540-545).

Chapter 748 fails the second prong of *Lemon* because the cultural needs of the children of Kiryas Joel are inextricably linked to fundamental Satmar religious beliefs which define the essence of Satmar culture, and dictate, in relevant part, that Satmar children be educated separate and apart from non-Satmar students. (See, *Board of Education of the Monroe-Woodbury CSD v. Wieder*, 72 NY2d 174; *Parents' Assn. of P.S. 16 v. Quinones*, 803 F.2d 1235). The only reason why Village residents required a separate school district was because of their religious need to

remain culturally isolated. Had the dispute between Village residents and Monroe-Woodbury truly been over the appropriateness of services being provided by Monroe-Woodbury, Village parents could have exercised their statutory right to an administrative review of their secular concerns, and to judicial review of any adverse determination produced by the administrative appeal, rather than necessitating the establishment of the KJVSD. (*Grumet v. Board of Educ. of the Kiryas Joel Village School Dist.*, 187 AD2d at 24; 34 CFR 300.403(b); 34 CFR 300.500-300.514; 8 NYCRR 200.5; Record on Appeal to the Court of Appeals, p. 795). Thus, the primary effect of the contested statute is not to provide Village children with special education services, but rather to involve the state in sponsorship of Satmar separatist precepts.

B. *Wisconsin v. Yoder*

To the extent petitioners argue the Court of Appeals erred in refusing to uphold the constitutionality of Chapter 748 as a proper accommodation of the Satmar religious culture similar to that afforded the Amish in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court most recently explained in *Lee v. Weisman*, "[t]he principal that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause" (___ U.S. ___, 112 S.Ct. 2649 at 2655). Indeed, the state may limit conduct grounded in religious beliefs where it is essential to accomplish an overriding governmental interest, irrespective of the substantial impact such regulation would have upon the practice of one's religious beliefs. (*Bob Jones University v. United States*, 461 U.S. 574 (1983); *United*

States v. Lee, 455 U.S. 252 (1982); see, *Thomas v. Review Board*, 450 U.S. 707, 718 (1981); *Sherbert v. Verner*, 310 U.S. 398, 402-403 (1963)).

In the present action, government has two compelling interests not to accommodate Satmar separatist beliefs. First, such an accommodation would contravene the basic purpose of our system of public education to prepare students for citizenship in a heterogeneous democratic society because the state would be directly involved in promoting separatism rather than pluralism. (*Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159 (1986)); Record on Appeal to the Court of Appeals, p. 101; cf. *Wisconsin v. Yoder*, 406 U.S. 205. Second, it would advance Satmar religious precepts in violation of the Establishment Clause. (See, *Parents' Assn. of P.S. 16 v. Quinones*, 803 F.2d 1235). Kiryas Joel residents may believe in and practice an insular way of life, but the state may not undertake action, such as the one contested herein, which in essence transforms government into an active sponsor of religious beliefs.

In addition, the *Yoder* case is clearly distinguishable from the present case. The accommodation afforded the Amish did not contravene the principles which serve as the foundation of public education. It merely involved the exemption of Amish children from compulsory attendance requirements so that they could be educated in the ways necessary to enable them to sustain the Amish agrarian way of life, essential to the physical survival of the community. Therefore, the compelling state interest in upholding Wisconsin's compulsory education laws did not outweigh the free exercise right of the Amish to have their children excused from school attendance after the

children had attended public school through the eighth grade.

In contrast, the accommodation of Satmar separatist beliefs in the manner contested herein violates the very foundation of our system of public education. It also requires an affirmative and substantial act of government, not present in *Yoder*, which serves to advance religious beliefs in violation of the Establishment Clause. Therefore, in the present case, the compelling state interests involved outweigh the free exercise rights of the residents of the Village.

Respondents further submit that the KJVSD cannot disclaim insularism as a Satmar religious precept, and at the same time contend that the accommodation of the religious reasons underscoring their refusal to accept publicly funded educational services at a location outside their community merely has the effect of lifting a burden on the free exercise of religion.

C. *Wolman v. Walter*

Petitioners' reliance on this Court's decision in *Wolman v. Walter*, 433 U.S. 229 (1977), and its progeny, upholding the constitutionality of accommodating parental requests that public educational services be provided to students attending non-public schools at "neutral sites" is misplaced. As Monroe-Woodbury effectively argued before the Appellate Division, Second Department, in the *Wieder* case discussed above, the residents of the Village never requested a truly "neutral" site from Monroe-Woodbury. Their request was for a site apart

from the Village's parochial schools but where their children would still be educated *exclusively* with other Hasidic children, thereby advancing the separatist religious precepts of the Satmar Hasidim. That is exactly what the statute herein has granted the residents of the Village, a site which is not truly neutral, but rather, a site where, by design, their children can receive publicly-funded special educational services exclusively with other orthodox Jewish children. As determined by Supreme Court, Albany County, in the decision affirmed below, in providing for the establishment of the KJVSD "the Executive and the Legislature . . . [took] the extraordinary measure of creating a governmental unit to meet [the Village residents'] parochial needs" (151 Misc.2d at 64). That the KJVSD *may* admit students from other school districts is not to the contrary for, under the New York State Education Law, the KJVSD is not obligated to do so. It is obligated to educate only its residents.

Indeed, the Court of Appeals determined below that this Court held in *Wolman* that:

'considerations of safety, distance, and the adequacy of accommodations' could justify a public school's provision of remedial services in mobile units located on neutral sites near non-public school premises (see, *Wolman v Walter*, 433 US at 247, n 14, *supra*). Contrary to the assertions by the dissent, the legislation at issue in this case does not effect a " 'unit on a neutral site' " serving only sectarian pupils (see, dissenting opn at 554). Rather, the statute creates an entirely new school district coterminous with the Satmarer Hasidic community of Kiryas Joel and establishes a school board composed of members

elected by the voters of the Village. This goes beyond any directive by the Supreme Court or this Court for the provision of special services to handicapped children at a neutral site (see, *Wolman v Walter*, 433 US 229, 248, *supra*; *Board of Educ. v Wieder*, 72 NY2d 174, 188, *supra*). (81 NY2d at 530).

2. **The Decision of the New York State Court of Appeals is consistent with this Court's holdings concerning accommodation under the Establishment Clause.**

The New York State Court of Appeals properly refused to find Chapter 748 constituted a constitutional accommodation of Satmar beliefs and culture. The alleged accommodation effected by the New York State Legislature herein violates the Establishment Clause because as stated by Judge Kaye in her concurring opinion below,

the legislative response plainly went further than necessary to resolve the problem . . . The impact of the Legislature's remarkable action of carving out a new school district coterminous with a religious enclave must not be assessed in a vacuum but measured against history. For almost 40 years, ever since the landmark decision in *Brown v Board of Educ.* (347 US 483), government-sponsored segregation efforts have been unlawful (see, e.g., *United States v Scotland Neck Bd. of Educ.*, 407 US 484, 489-490 [carving out new school district from existing one impermissible because it impedes desegregation]; compare, Education Law §2590-b [3] [a] [vi] ["heterogeneity of pupil population" a criterion in creating local school districts]; *Mississippi*

Univ. for Women v Hogan, 458 US 718 [gender-based admissions policy unconstitutional]). Against this historical backdrop, the "symbolic impact" (*Grand Rapids School Dist. v Ball*, 473 US, at 390, *supra*) of creating a new school district to serve the needs of a particular religious group cannot be overstated . . . The impasse between Monroe-Woodbury and the Satmarer concerned only special education services for disabled children. Nevertheless, the Legislature responded by creating a new public school district vested with *all* the powers of a union free school district, which are vast[, and pose] no legal impediment to the new district's operation of a public school program for nondisabled children if it chose to do so. Manifestly, the delegation of such power to the new district demonstrates that the legislation exceeded the problem that engendered it. (81 NY2d 518 at 537-538 (Kaye, J., concurring)).

In this context, the Legislature could certainly have taken more moderate measures to resolve the conflict between Village residents and Monroe-Woodbury, as observed by Judge Kaye in her concurrence below. Such alternative measures would still be available to the New York State Legislature should this Court not grant petitioners' writ for certiorari. As a result, review by this Court of this factually unique case is unnecessary.

3. This case is not the appropriate vehicle for reexamining the tripartite test of *Lemon v. Kurtzman*.

The *Lemon* test has served as a guide for courts to distill violations of the Establishment Clause which are

less than the actual establishment of a formal state religion (see, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Lemon v. Kurtzman*, 403 U.S. 602). It represents not a mechanical means for analyzing Establishment Clause issues, but a distillation of principles which serve to forestall both the abuse of religion by political power, and the abuse of political power by religion. (See, *State v. Celmer*, 80 N.J. 405, 404 A.2d (1979); cf. *Oregon v. Rajneeshpuram*, 598 F.Supp. 1208 (D. Oregon 1984); see also, *Larkin v. Grendel's Den*, 459 U.S. 116 (1982)).

Notwithstanding, petitioners urge this Court to grant their petition for certiorari based, in part, on their perspective as to the questionable viability of the *Lemon* test. Should this Court, indeed, be inclined to formally inter or modify the *Lemon* test, respondents ask the Court to step back and consider whether this case truly represents the appropriate vehicle for such purpose. This case involves unique factual circumstances, and has limited future application.

Furthermore, respondents respectfully submit that, irrespective of what test is ultimately applied, the creation of a separate publicly-funded school district for an exclusive religious community whose religious precepts require separation from individuals who are not members of their faith violates the very core of constitutional prescriptions for the separation of church and state.



CONCLUSION

FOR ALL OF THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: Albany, New York
October 29, 1993

Respectfully submitted,

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Attorneys for Respondents

SUPREME COURT OF THE UNITED STATES

BOARD OF EDUCATION OF THE
KIRYAS JOEL VILLAGE SCHOOL
DISTRICT; BOARD OF
EDUCATION OF THE MONROE-
WOODBURY CENTRAL SCHOOL
DISTRICT; and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE
STATE OF NEW YORK,

AFFIDAVIT IN
OPPOSITION TO
APPLICATION
FOR EXTENSION
OF STAY

Petitioners,

v.

LOUIS GRUMET and ALBERT W.
HAWK

Respondents.

STATE OF NEW YORK)
)
COUNTY OF ALBANY) ss.:

THOMAS SOBOL, being duly sworn, deposes and
says:

1. I am Commissioner of Education of the State of
New York and the chief executive officer of the state
system of education and of the Board of Regents. As such,
I am responsible for, *inter alia*, the general supervision of
all public schools in the State.

2. I make this affidavit in opposition to appellants'
application for a stay pursuant to Rule 23 of the Rules of

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the Supreme Court of the United States against enforcement of the New York Court of Appeals' Order in the above-captioned matter, until final disposition on a petition for writ of certiorari by the United States Supreme Court.

3. The New York Court of Appeals' Order, entered July 8, 1993, affirmed the determination of the two lower courts that Chapter 748 of the Laws of 1989 establishing the Kiryas Joel Village School District (hereinafter also referred to as "KJVSD") is unconstitutional, in violation of the Establishment Clause of the First Amendment to the United States Constitution.

4. I am advised by my legal counsel that, if the application for an extension of the statutory stay is granted, the State Education Department will be required to continue to disburse federal funds and state aid to the KJVSD pursuant to the provisions of §§ 1411 and 1414 of the federal Individuals with Disabilities Education Act and §§ 3601 and 3602 of the New York State Education Law.

5. The continued disbursement of federal funds and state-aid to the KJVSD during the pendency of a petition for writ of certiorari before the United States Supreme Court creates unique problems because, if the determination of the New York State Court of Appeals is ultimately upheld and the district ceases to exist, there will be no means to recover federal funds and state-aid provided in contravention of the United States Constitution.

6. As the agency responsible for the educational welfare of all children within the State of New York, the State Education Department is fully prepared to assist the

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Monroe-Woodbury Central School District to provide appropriate special educational services to all the children entitled to receive them from the Kiryas Joel Village School District.

7. In the event that the United States Supreme Court either decides not to grant the appellants a Writ of Certiorari or grants the Writ and ultimately affirms the decision of the New York State Court of Appeals, the Kiryas Joel Village School will cease to exist. Executing the decision of the New York State Court of Appeals at this time, during the summer months, will be far less disruptive to the majority of the children receiving educational and related services from the Kiryas Joel Village School District than would a closing at any other time during the school year. In addition, I am advised by my Coordinator of Educational Aids and Services, Gregory Illenberg, that if the Kiryas Joel Village School District is not dissolved during the summer, there would be major fiscal implications for the Monroe-Woodbury Central School District. If the district is not dissolved before September 1993, Monroe-Woodbury would have no access to the property tax revenues already collected by the Village of Kiryas Joel. (See affidavit of Gregory Illenberg at paragraphs 28-30).

8. During the 1991-92 school year, the Kiryas Joel Village School District reported 10.9 full-time resident students enrolled in its public school program with 10 children enrolled in its full-time summer program. Furthermore, according to the data provided by the Kiryas Joel Village School District, there were only 13 resident children enrolled full-time in the district's public school during the 1992-93 school year.

9. Based on the enrollment data submitted by the Kiryas Joel Village School District for the 1992-93 school year, if the Stay is denied, the Monroe-Woodbury Central School District would only be required to serve immediately in a full-time special education program, the small number of children currently enrolled in the Kiryas Joel Village School District's similar program.

10. Based on the enrollment data submitted by the Kiryas Joel Village School District for the 1992-93 school year, approximately 95 children are currently enrolled by their parents in the parochial schools located in the Village of Kiryas Joel who receive only supplementary special education services from the Kiryas Joel Village School District pursuant to the dual enrollment provision contained in New York's Education Law § 3602-c.

11. According to data submitted by the Kiryas Joel Village School District, the vast majority of those students enrolled in parochial schools who are receiving dual enrollment services are only receiving one (1) period of special education services per day.

12. For the foregoing reasons, appellants' application for a stay should be denied as it will not create a [sic] undue hardship on the Monroe-Woodbury Central School

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District and because the most opportune time to make the necessary transition is now.

/s/ Thomas Sobol
Thomas Sobol

Sworn to before me this
21st day of July, 1993.

/s/ Karen Norlander [seal]
Notary Public

KAREN NORLANDER
Notary Public, State of New York
Qualified in Rensselaer County
Reg. No. 4787145
Commission Expires November 30, 1993

SUPREME COURT OF THE UNITED STATES

BOARD OF EDUCATION OF THE
KIRYAS JOEL VILLAGE SCHOOL
DISTRICT; BOARD OF
EDUCATION OF THE MONROE-
WOODBURY CENTRAL SCHOOL
DISTRICT; and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE
STATE OF NEW YORK,

AFFIDAVIT

Petitioners,

v.

LOUIS GRUMET and ALBERT W.
HAWK

Respondents.

STATE OF NEW YORK)
)
COUNTY OF ALBANY) ss.:

GREGORY ILLENBERG, being duly sworn, deposes
and says:

1. Since 1985, I have been the Chief of the Bureau of State Aided Programs at the State Education Department (hereinafter referred to as "SED"). As a result of an SED reorganization my current title is Coordinator of Educational Aids and Services. In my capacity as both Bureau Chief and Coordinator of Educational Aids and Services, I am responsible for the collection of pupil and financial data in support of state-aid claims and projections, and I

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have an expertise in all matters of state-aid and school finance.

2. Pursuant to New York State Education Law § 215, school districts are required to file any and all reports that the Commissioner of Education may require.

3. In order to have received state-aid for the 1992-93 school year, to which public school districts are eligible, such public school districts were obligated to file pupil and financial data with SED pursuant to Education Law § 3609.

4. On November 24, 1992, pursuant to such statutory obligations, the Kiryas Joel Village School District submitted over the Technology Network Ties System, (SED's computer network) Form SA-100/19 entitled the "Basic Data Collection Document" (attached hereto as Addendum A).

5. This document provides the SED with required pupil and financial data in support of state-aid claims and projections.

6. The information which is contained in Form SA-100/19 was certified on October 1, 1992 by Abraham Wieder, President of the Board of Education of the Kiryas Joel Village School District as an accurate accounting of the pupil and financial data for the district (This document is attached as Addendum B).

7. After SED received the information contained in the SA-100/19, it produced a computer printout Form Number SA-464 which is entitled: "Three Year Trend Summary, District Pupil and Financial Data" (attached hereto as Addendum C).

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8. The SA-464 for the Kiryas Joel Village School District dated December 10, 1992 was forwarded to the Kiryas Joel Village School District for purposes of correction and/or verification of the 1992-93 estimated data.

9. The Kiryas Joel Village School District, through its Business Manager, Joseph Hartman, reviewed the SA-464 and made four (4) corrections to the financial data but made no corrections to the pupil data.

10. Mr. Hartman signed and dated the SA-464 (attached hereto as the last page of Addendum C) on December 28, 1992 and mailed the document to the State Education Department which was received and date-stamped by the Department at 1:05 P.M. on January 4, 1993.

11. SED establishes a database using the verified data contained in the SA-464 for all public school districts eligible for state-aid pursuant to § 3602 of the New York State Education Law.

12. The SED database was used to produce the "1993-94 State Aid Projections" dated April 1993 Run Number SA939-4 (hereinafter referred to as "the SA939-4") in support of school aid legislation adopted by Chapter 57 of the Laws of the State of New York 1993.

13. Page 87 of the SA939-4 subtitled, "Public and Private School Excess Cost Aid For Children With Disabilities," (attached hereto as Addendum D) displays such data for the Kiryas Joel Village School District.

14. Addendum D is based on the data previously certified by the Kiryas Joel Village School District as

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accurate and complete regarding its resident public school student population with disabilities.

15. Addendum D shows that during the 1992-1993 school year, there was a total of 13 resident students with disabilities who were enrolled as full time students in the Kiryas Joel Village School District. (See also Addendum C, lines 33-35 column 1992-93 Est. which shows the 13 students by grade level.)

16. Form SA-464 reports 29 non-resident students enrolled in the district (See Addendum C, line 6 column 1992-93 Est).

17. Pursuant to Education Law § 3202 entitled "Public Schools Free to Resident Pupils; Tuition from Nonresident Pupils," the above mentioned 29 children are the responsibility of their respective school districts of residence.

18. Pursuant to Education Law § 3602-c entitled: "Apportionment of Moneys to School Districts for the Provision of Services to Pupils Attending Nonpublic Schools," the Kiryas Joel Village School District is also responsible for providing special education programs to all children both resident and nonresident enrolled in parochial schools within the boundaries of the district.

19. For aid payable in the 1992-93 school year, the Kiryas Joel Village School District submitted Claim Form SA-129H (attached hereto as Addendum E), for services provided pursuant to Education Law § 3602-c.

20. The SA-129H data reported an average daily attendance of 83.638 pupils in dual enrollment receiving public school services one (1) period per day plus an

average daily attendance of 9.491 pupils in dual enrollment receiving public school services two (2) periods per day and an average daily attendance of 2.011 pupils in dual enrollment receiving public school services three (3) periods per day. The sum of ~~such~~ average daily attendance for all pupils in dual enrollment in the Kiryas Joel Village School District is 95.14.

21. On December 3, 1992, Mr. Hartman prepared Federal form PD-1 entitled "Number of Pupils with Disabilities Provided Special Education," and which was signed by the Kiryas Joel Village School District's Superintendent of Schools, Mr. Steven Benardo (attached hereto as Addendum F).

22. On Addendum F, the Kiryas Joel Village School District reports that it serves 140 resident children with disabilities. This count includes students in dual enrollment who attend parochial schools within the district and only thirteen (13) resident children who are enrolled in its public school.

23. On the SA-464 form, the Kiryas Joel Village School District reported to SED enrollment of 192 students in the district (See Addendum C lines 1-4 column 1992-93 Est.).

24. If the Kiryas Joel Village School District ceases to exist, pursuant to the order of the New York State Court of Appeals, the Monroe-Woodbury Central School District, the school district to which the children of the Village of Kiryas Joel would then belong, would be required to absorb the 13 resident full-time students of the Kiryas Joel Village School District and provide any

requested dual enrollment services to the remaining children currently attending parochial schools in the Kiryas Joel Village School District.

25. The twenty-nine (29) nonresident students enrolled full-time in the Kiryas Joel Village School District's public school would continue to be the responsibility of their respective school districts of residence which would be required to provide the special education services recommended by their local school district committee on special education.

26. For purposes of dual enrollment, the cost of providing special education services to the non-resident students enrolled in the parochial schools in the Village of Kiryas Joel, would remain the fiscal responsibility of those school districts where such children reside whether or not the Kiryas Joel Village School District continues.

27. The Kiryas Joel Village School District presently leases its public school building and has reported lease expenditures of \$212,960 for the 1993-94 school year (See Addendum C line 267).

28. Pursuant to Article 13 of the New York State Real Property Tax Law, real property owners are obligated to pay school taxes to the school district where the property is located as identified on the assessment role used for the levy.

29. In the present situation, if the Stay is granted, the real property in the Village of Kiryas Joel will remain on the assessment role of the Kiryas Joel Village School District for taxes to be levied in September of 1993 for the 1993-94 school year.

30. Thereafter, if the decision of the New York State Court of Appeals is upheld and the Monroe-Woodbury Central School District becomes responsible for the education of resident children of the Village of Kiryas Joel, the Monroe-Woodbury Central School District will have no access to the property tax revenues from the real property located in the Kiryas Joel Village School District for the duration of the 1993-94 school year. This is so because the Kiryas Joel Village School District would have already collected such taxes and, to the best of my knowledge, there is no mechanism to recoup any additional school tax revenues in the event the Kiryas Joel Village School District ceases to exist.

/s/ Gregory Illenberg
Gregory Illenberg

Sworn to before me this
21st day of July, 1993.

/s/ Karen Norlander [seal]
Notary Public

KAREN NORLANDER
Notary Public, State of New York
Qualified in Rensselaer County
Reg. No. 4787145
Commission Expires November 30, 1993

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

LOUIS GRUMET, individually and as Executive Director of the New York State School Boards Association, Inc.; ALBERT W. HAWK, individually and as President of the New York State School Boards Association, Inc.; and the NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC.,

Plaintiffs,

- against -

BOARD OF EDUCATION OF
THE KIRYAS JOEL VILLAGE
SCHOOL DISTRICT; AND
BOARD OF EDUCATION OF
THE MONROE-WOODBURY
CENTRAL SCHOOL DISTRICT.

Defendants.

AFFIDAVIT OF
DR. ISRAEL
RUBIN

Index No.

1054-90

RJI No.

0190-021649

Assigned Justice:

Hon. Lawrence E.

Kahn

STATE OF OHIO)
) ss.:
COUNTY OF CUYAHOGA)

ISRAEL RUBIN, being duly sworn, deposes and says that:

1. I was born in Rumania, came to the United States in 1947, and subsequently received a Ph.D. in Sociology at the University of Pittsburgh in 1965.

2. In 1966, I was appointed Associate Professor of Sociology at the Cleveland State University in Cleveland, Ohio and in 1974 I was promoted to Professor of Sociology.

3. During 1960-1961, I studied the community of Satmar, which was then concentrated in the Williamsburg section of Brooklyn. In 1972 my book SATMAR: AN ISLAND IN THE CITY which contains a sociological analysis of the group was published by Quadrangle Books. In 1988 I restudied the community, including Kiryas Joel located near Monroe, New York, on [sic] area Satmarer began to settle in 1974 and later incorporated as the village of Kiryas Joel. An updated edition of SATMAR is now being prepared, presently under contract to be published by Peter Lang Publishers.

4. During the last thirty years (25 of these at Cleveland State), I have taught a variety of courses in Sociology, including an occasional course directly concerned with Jewish traditional culture. In the general courses I have frequently used the case of Satmar to illustrate a variety of theoretical issues of concern to our discipline, including such subjects as continuity/change and independence training of children.

5. Due to my extensive study of this community and my published material, I am considered an expert on SATMAR. In this capacity I have over the years addressed and consulted with various organizations on aspects of Satmar culture and behavior.

6. I am making this affidavit at the request of attorneys for plaintiffs, for the purpose of providing general information on Satmar Hasidic culture and religion, for

the record in the above-entitled action, not in support of the case being litigated. The information given is based on my knowledge of and familiarity with the community.

7. Religion and its preservation in the form interpreted and practiced in Satmar, occupies a central place in virtually all matters of importance.

8. The Satmarer comprise a Hasidic religious community traditionally focused around its leader called the Rebbeh rather than around a particular residential area. In our case, the history of the community can more accurately be conceived of as the history of the original Satmar leader, Reb Yoel Teitelbaum. Reb Yoel actually molded the members of varied origin into a distinct community and served as its leader from the community's inception in 1904-1905 until his death in 1979. After his death, Reb Yoel was succeeded by his nephew Reb Moshe Teitelbaum.

9. The Satmar leadership today is considerably less centralized than it was under the leadership of Reb Yoel, less absolute than it was a generation ago, and thus more flexible when it comes to dealing with local situations. However, the present Rebbeh officially inherited the same mandate his uncle had, namely to be the ultimate decision-maker in all matters of concern to the Satmar community.

10. Unlike thirty years ago when the bulk of Satmar in New York State was concentrated in the Williamsburg section of Brooklyn, the Satmar community now has three additional localities in which a significant number of

Satmarer reside. Specifically, there are numerous Satmarer in Brooklyn's Borough Park section, in Monsey, Rockland County, and in Kiryas Joel, Orange County.

11. The local leaders of each sub-unit, especially those involved in running the local school systems, have been given a high degree of autonomy. They enjoy flexibility to address local conditions, as long as their decisions do not explicitly violate norms regarded as absolutely sacred. To be sure, Reb Moshe occasionally does step in to exercise his official role as supreme decision-maker.

12. Because of its peculiar character as a Satmar townlet, Kiryas Joel has a unique situation. The Rebbeh has appointed his oldest son, Reb Aron Teitelbaum, to be the Rov, or town rabbi. Therefore, he plays a significant role in the leadership process, which is complicated by the fact that a large number of residents are dissatisfied with the appointment.

13. Some residents of Kiryas Joel have expressed their dissatisfaction with the appointment of Reb Aron Teitelbaum as town rabbi by showing loyalty to the founding Rebbeh Joel Teitelbaum's widow (also a Kiryas Joel resident). Others have withdrawn from active involvement in community affairs. The more militant opponents have created a school system of their own, thus defying both the Rebbeh and the Rov who have bitterly fought against the rival system.

14. Resistance to pressures for acculturation emanating from the surrounding sociocultural system serves as the chief rationale for the Satmar effort to maintain a separate community.

15. The private educational network run by Satmar is regarded as the chief instrument through which Satmar's culture is transmitted to future generations. It is this central goal which underlies both theory and practice in these schools, because they are meant to serve primarily as a bastion against undesirable acculturation, as a training ground for Torah knowledge in the case of boys, and in the case of girls, as a place to gather knowledge they will need as adult women. With the reported exception of the public school for the handicapped Satmarer do not intend their schools to be the chief instrument of preparing one for his/her occupational role.

16. Secular education, although growing in importance over time, is regarded to be of limited significance beyond its role of assisting the eventual necessity to make a living and to support a family. Consequently, higher education, except in technical matters such as training in computer-related and language skills, is regarded as unnecessary, nay undesirable. In fact, prevention of undesirable acculturation is the main reason for having their own school system, instead of sending their children to public school where they would be exposed to the influence of peers and teachers whose life styles clash with that of Satmar. By the same token, secular subjects other than those involving technical training are feared for their possible contents of ideas subversive to Satmar culture. This, incidentally, is also the reason for the ban against television. For, unlike the Old-Order Amish, Satmarer do not object to technology as such (see computers, for example). What they object to are all potential agents of undesirable acculturation.

17. Although secular studies are more readily offered and more easily accepted by Satmarer girls because girls, by tradition, are not taught religion to the extent boys are, secular studies still have their limitations. Textbooks are censored in advance and library book borrowing is forbidden because of the uncensored content of such books. Nonacademic subjects such as art, music and physical education are absent, and education is terminated at the end of high school.

18. Prior to and outside of marriage, Satmar men and women are discouraged from looking at or talking to each other, for fear that it might produce "impure thoughts" and may eventually lead to violation of the sexual code. Hence, males and females are segregated from early in life when young children of opposite gender are prohibited to play together.

19. Basically, it is religion which underlies the practice of gender-segregation (see discussion below). In spite of the fact that abstention and celibacy are negatively valued in the culture, sex has always been and continues to be a tabooed subject. Its practice is encouraged in the privacy of the marital chamber, while publicly (even in the home) any show of affection between men and women, or any verbal mention of the subject, in [sic] considered highly improper.

20. The private schools are, of course, among the places where gender segregation is strictly observed. Here additional factors come into play. First, Torah (sacred teaching) is to be studied with a "pure mind", not accompanied by sinful thoughts bound to arise when in the presence and vicinity of members of the opposite

gender. Then Satmarer frequently justify their practice by pointing to the continuous proliferation in the surrounding society, especially within the public schools, of premarital sexual activity and the accompanying rise of teenage pregnancy rates, generally recognized as constituting a severe social problem. For Satmarer even the thought of their youth being influenced in this direction produces images of horror and abomination.

21. However, I have recently been in contact by telephone with several informants I trust. They all reported that in the case of the handicapped, boys and girls do attend together. They also pointed out that here, unlike in their private schools, occupational preparation is a main instructional objective. As said, this comes to me long distance (albeit from what I consider reliable sources), and is not based on direct observation.

22. I respectfully request that the factual assertions set forth herein be accepted by the Court as accurate to the best of my knowledge.

/s/ Israel Rubin
Israel Rubin, Ph.D
Professor of Sociology
Cleveland State University

Sworn to before me this
30 day of April, 1991

/s/ Lisa M. Swaney [seal]
Notary Public

LISA M. SWANEY
Notary Public, State of Ohio
My Commission Expires Feb. 9, 1995

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

LOUIS GRUMET, individually and as Executive Director of the New York State School Boards Association, Inc.; ALBERT W. HAWK, individually and as President of the New York State School Boards Association, Inc.; and the NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC.,

Plaintiffs-Respondents,

-against-

NEW YORK STATE EDUCATION DEPARTMENT; THOMAS SOBOL, as Commissioner of the New York State Education Department; NEW YORK STATE BOARD OF REGENTS; EDWARD V. REGAN, as New York State Comptroller; EMANUEL AXELROD, as District Superintendent of Orange-Ulster BOCES; BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT; BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT.

Defendants-Appellants.

AFFIDAVIT OF
HON. THOMAS
SOBOL,
COMMISSIONER
OF EDUCATION
IN SUPPORT OF
MOTION TO
VACATE
STATUTORY
STAY

Albany County
Clerk

Index No.

1054-90

RJI No.

01-90-021649

Assigned Justice:
Hon. Lawrence E.
Kahn

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

THOMAS SOBOL, being duly sworn, deposes and says:

1. I am Commissioner of Education of the State of New York and the chief executive officer of the state system of education and of the Board of Regents. As such, I am responsible for, *inter alia*, the general supervision of all public schools in the State.

2. I make this affidavit in support of plaintiffs' motion to vacate the automatic stay, pursuant to CPLR §5519(a)(1), of the Judgment and Order of Supreme Court, Albany County, entered February 10, 1992, which declared Chapter 748 of the Law of 1989 establishing the Kiryas Joel Village School District (hereinafter also referred to as "KJVSD") unconstitutional.

3. I am advised by my legal counsel that, if the statutory stay is not vacated, the State Education Department (hereinafter also referred to as "SED") will be required to continue to disburse state-aid to the KJVSD pursuant to §§3601, 3602 of the Education Law. The district will generate additional state-aid if its immediate plan to purchase a building is approved. (See paragraphs 5 through 8).

4. The continued disbursement of state-aid to the KJVSD during the pendency of its appeal creates unique problems for the state because, if the lower court decision is ultimately upheld, there will no means to recover state-aid from a district that ceases to exist .

5. I am advised by staff from SED's Division of Facilities Planning that the KJVSD plans to expand its instructional program to include a regular kindergarten.

6. Consistent with this request, SED staff is reviewing plans submitted by the KJVSD of a facility it proposes to purchase to conduct regular kindergarten classes.

7. The purchase of a school building by the KJVSD would automatically generate additional state-aid for the district pursuant to §3602(6) of the Education Law. This additional state-aid will greatly increase the funds currently available to the district.

8. Furthermore, the expansion of the KJVSD instructional program to include a regular kindergarten intensifies SED's need to monitor closely the district to ensure that public funds are not expended to further religious purposes.

9. For the foregoing reasons, plaintiffs' motion should be granted and the stay vacated.

/s/ Thomas Sobol
Thomas Sobol

Sworn to before me this
5th day of March, 1992.

/s/ Jay Worona [seal]
Notary Public

JAY WORONA
Notary Public, State of New York
Qualified in Albany County
No. 4785288
Commission Expires Nov. 30, 1993

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

LOUIS GRUMET, individually and as Executive Director of the New York State School Boards Association, Inc.; ALBERT W. HAWK, individually and as President of the New York State School Boards Association, Inc.; and the NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC.,

Plaintiffs-Respondents,
-against-

NEW YORK STATE EDUCATION DEPARTMENT; THOMAS SOBOL, as Commissioner of the New York State Education Department; NEW YORK STATE BOARD OF REGENTS; EDWARD V. REGAN, as New York State Comptroller; EMANUEL AXELROD, as District Superintendent of Orange-Ulster BOCES; BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT; BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT.

Defendants-Appellants.

AFFIDAVIT OF ROBERT LAVERY

Albany County
Clerk

Index No.

1054-90

RJI No.

01-90-021649

Assigned Justice:
Hon. Lawrence E.
Kahn

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

ROBERT LAVERY, being duly sworn, deposes and says:

1. I am Senior Architect in the Division of Facilities Planning of the New York State Education Department (hereinafter also referred to as "SED"). I have served in this position since 1987. As such, I review the building plans for facilities that public school districts in New York State seek to construct or purchase for use as school buildings. I am personally familiar with the facts set forth herein.

2. On or about December 6, 1991, I received a visit from Dr. Steven M. Benardo, Superintendent of Schools of the Kiryas Joel Village School District (hereinafter also referred to as "KJVSD").

3. During the visit, and in ongoing conversations, Dr. Benardo indicated that the KJVSD would like to purchase an existing school building constructed a few years ago for use by nonpublic school students. The KJVSD wishes to purchase this building for the purpose of providing kindergarten instruction to nonhandicapped children in addition to providing special education services to handicapped children.

4. At present, the KJVSD is leasing a facility for its special education program.

5. During ongoing conversations on this matter, Dr. Benardo has also indicated the district's future plan to construct a facility. According to him, the KJVSD seeks to build or purchase school buildings rather than lease, in order to obtain building aid from the state.

6. A school district receives no additional state-aid when it leases a school building. However, the purchase of an existing facility and/or the construction of a new one generates building aid pursuant to §3602(6) of the Education Law.

7. During his visit on or about December 6, 1991, Dr. Benardo submitted for my review the building plans of the facility the KJVSD wishes to purchase, which I determined did not meet SED's traditional building standards.

8. Upon information and belief, SED has never had a request to approve a building site to house nonhandicapped kindergarten students in an existing district that otherwise educates only students with disabilities. Therefore, the plans are presently under review to determine whether a variance may be granted.

9. If a variance is granted, the KJVSD would receive approval to purchase the building which would generate additional state-aid.

10. Dr. Benardo has indicated that the district's goal is to purchase the building as soon as possible for use as a public school.

Sworn to before me this
6th day of March 1992.

/s/ Robert Lavery
Robert Lavery

/s/ Jay Worona
Notary Public

[seal]

JAY WORONA
Notary Public, State of New York
Qualified in Albany County
No. 4785288
Commission Expires Nov. 30, 1993

3

Supreme Court, U.S.
FILED
NOV - 9 1993
OFFICE OF THE CLERK

No. 93-527

In the Supreme Court of the United States
OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE
MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,

Petitioner,

-against-

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

**ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS.
FOR THE STATE OF NEW YORK**

**REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Lawrence W. Reich
Counsel of Record

John H. Gross

Neil M. Block

INGERMAN, SMITH, GREENBERG,
GROSS, RICHMOND, HEIDELBERGER,
REICH & SCRICCA

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(516) 261-8834



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The Petition for a Writ of Certiorari presents issues of significant public importance and of a recurring nature which warrant the granting of the writ. Although the Brief in Opposition suggests that the facts of this case are so unique that review by this Court will have limited future applicability, this is clearly not true. What is before the Court in the within appeal is the constitutionality of permissive legislative accommodation in that "zone of accommodation" which lies between what is permissible under the Establishment Clause of the First Amendment to the Federal Constitution and what is compelled by the First Amendment's Free Exercise Clause.

It is settled law that the "scope of accommodation permissible under the Establishment Clause is larger than the scope of accommodation mandated by the Free Exercise Clause" (*County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, et al.*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 [1989]). No party contends that enactment of Chapter 748 of the Laws of 1989 was *compelled* by the Free Exercise Clause. Indeed, New York's Court of Appeals in *Board of Education of the Monroe-Woodbury C.S.D. v. Wieder*, 72 N.Y.2d 174, 531 N.Y.S.2d 889 (1988) had previously rejected a contention by the Satmarer that they had a right to insist that special education services be provided separately to their children, just as that Court similarly rejected the Board's argument that it could furnish such services only within the context of public school placements but not separately. Characterizing that litigation as "a litigation of 'musts'" (*id.*, at p.178), the Court noted:

It may well be that certain of the services in controversy could be furnished to defendants at neutral sites if plaintiff determined to do so

(See, *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714, *supra*). This declaratory judgment action poses only the abstract question whether services *must* be furnished in public schools (as plaintiff insists) or *must* be furnished separately (as defendant insists); the actual services involved are not even fully specified. We therefore have no occasion to—nor could we—determine where any particular services could be rendered in conformity with constitutional principles." (at Footnote 3, p.189) (emphasis in original)

In Neutchterlein, Note, The Free Exercise Boundaries of Permissible Accommodation Under The Establishment Clause, 99 Yale L.J. 1127 (1990), the author comments that courts must distinguish between those laws which take religion into account and those which were enacted *for the purpose of advancing religion*. He suggests that a law accommodating religious belief is not the same as one which purposefully advances it. Illustrative of the former are laws authorizing sacramental use of wine during Prohibition, laws authorizing sacramental use of peyote by certain Native American Indians and laws authorizing a "moment-of-silence". In such cases, state legislatures have acknowledged a religious belief but have not purposefully advanced it. He characterizes this phenomenon, the accommodation of religious beliefs of others as a respectful thing to do rather than for the purpose of advancing such beliefs, as a form of "secular respect". He notes that "[a]ccommodating these people simply reflects the government's secular respect for their right to choose their way of life".

Similarly, Justice Souter's concurring opinion in *Lee v. Weissman*, 505 U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467

(1992), also speaks to the necessity for accommodation. He notes:

That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account. The State may "accommodate" the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings. See, e.g., *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); see also *Sherbert v. Verner*, 374 U.S. 398 (1963). Contrary to the views of some, [FN7] such accommodation does not necessarily signify an official endorsement of religious observance over disbelief.

In everyday life, we routinely accommodate religious beliefs that we do not share. A Christian inviting an Orthodox Jew to lunch might take pains to choose a kosher restaurant; an atheist in a hurry might yield the right of way to an Amish man steering a horse-drawn carriage. In so acting, we express respect for, but not endorsement of, the fundamental values of others. We act without expressing a position on the theological merit of those values or of religious belief in general, and no one perceives us to have taken such a position.

The government may act likewise. Most religions encourage devotional practices that are at once crucial to the lives of believers and idiosyncratic in the eyes of nonadherents. By definition, secular rules of general application are drawn from the non-adherent's vantage

and, consequently, fail to take such practices into account. Yet when enforcement of such rules cuts across religious sensibilities, as it often does, it puts those affected to the choice of taking sides between God and government. In such circumstances, accommodating religion reveals nothing beyond a recognition that general rules can unnecessarily offend the religious conscience when they offend the conscience of secular society not at all. (at 112 S.Ct. 2649, 2676-77)

Chapter 748 of the Laws of 1989 accommodates a purely secular interest of the Satmarer by facilitating access by their disabled children to bilingual, bicultural special education programs and services. It should be noted that the decision of the Court of Appeals in *Wieder, supra*, which served, at least in part, as the catalyst for the legislation, acknowledged the argument of the Satmarer that "they should be exempted from public school placements only for *nonreligious* reasons—most particularly because of the emotional impact on the children of traveling out of Kiryas Joel" (*id.* at p.189 [emphasis in original]). Similarly, the legislative findings which prompted enactment of the Chapter also stressed the secular nature of the accommodation to be effectuated by the statute by conditioning provision of secular special educational programs and services within the context of a public school placement by public employees at a public site. If the accommodation also meets the religious preferences of the Satmarer, this is not a basis for invalidating it. As this Court noted in *Bowen v. Kendrick*, 487 U.S. 589 (1988):

"We see no reason to conclude that [the statute at issue] serves an impermissible religious purpose simply because some of the goals of the

statute coincide with the beliefs of certain religious organizations".

In *Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989) cert. den. 494 U.S. 1081, 110 S.Ct. 1811, 108 L.Ed.2d 942 (1990), the Court of Appeals for the Eighth Circuit specifically held that the mere fact that a governmental body took an action which coincided with the principles or desires of a particular religious group did not "transform the action into an impermissible establishment of religion" (*id.* at p.380). To the contrary, invalidation of an otherwise valid secular act merely because it coincides with the religious objectives of a particular religious group would constitute overt hostility to religious precepts rather than neutrality and would thus violate the "Free Exercise Clause".

This Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), illustrates the principle that a state may relieve a party of a burden upon its free exercise rights absent a compelling state interest to the contrary. Since this Court has held in the "neutral site" cases (*Wolman v. Walter*, 433 U.S. 229 [1977] and its progeny) that a public board of education may separately serve students sharing a common religious heritage at a public site without violating the Establishment Clause, it follows that the New York State Legislature was not constitutionally precluded from establishing a *de facto* public neutral instructional site for the disabled students of Kiryas Joel by enacting a statute which facilitated access to programs and services in a manner which addressed the Satmarer's legitimate secular concerns. In fact, the Court of Appeals of the State of New York in *Board of Education of Monroe-Woodbury C.S.D. v. Weider*, 72 N.Y.2d 174, 189, had directly alluded to the possibility that the Board might itself establish the "neutral site" and serve the Satmarer disabled students separately from other public school students.

IRRELEVANT ISSUES RAISED IN THE BRIEF IN OPPOSITION

Respondents have floated a veritable school of red herrings in opposition to the Petition. Amongst them are the effect to be afforded to various judicial precedents involving other Satmarer on unrelated issues, the applicability of the Individuals with Disabilities Education Act, and the existence of an alleged obligation to create large, heterogeneous public school districts. These issues are irrelevant and should not be considered.

A. Other Cases Involving Satmarer

Respondents would have this Court adopt a new evidentiary standard by giving collateral estoppel or issue preclusion effect to findings of fact and conclusions of law in a variety of unrelated cases also involving Satmarer Hasidim. This is manifestly inappropriate.

In *Board of Education of the Monroe-Woodbury C.S.D. v. Weider*, 72 N.Y. 174 (1988), the issue before the New York State Court of Appeals was not what was permissible but rather what was required. Thus, the case is inapplicable except to the extent which it supports a legislative history of the Chapter which recognized a perceived secular need for special education services based upon the existence of such non-religious factors as fear of travel outside the community into a broader world in which the Satmarer students were recognized as being "different" by virtue of their customs, practices and distinctive manner of dress.

Bollenbach v. Board of Education of the Monroe-Woodbury C.S.D., 659 F.Supp. 1450 (S.D.N.Y. 1987), involved the employment rights of more-senior male bus drivers who drove bus transportation routes involving

Satmarer Hasidic students. However, since male and female students are educated together in the public school classes of the Kiryas Joel Village School District and since the District employs staff without regard to race, color, creed, national origin or sex, it is difficult to perceive the relevance of *Bollenbach*.

Parents' Association of P.S. 16 v. Quinones, 803 F.2d 1235 (2nd Cir. 1986), involves a Hasidic community located in Brooklyn, New York and an entirely unrelated set of facts. None of the parties hereto were parties to *Quinones*, *supra*, and consequently the findings of fact made therein are not binding upon petitioner. In *Quinones*, *supra*, the New York City Public School District had closed off nine classrooms in a public school building for the exclusive use of Hasidic female students, employed only Yiddish-speaking female teachers and utilized the teaching methodology preferred by the Satmarer. Upon these facts, it was understandable that the Court found an impermissible endorsement of governmental support for the separatist tenets of the Satmarer, in violation of the second prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This should be sharply contrasted with the legislation at issue, which vests responsibility for provision of programs and services in a public body which, in actual practice, conducts the activities of the District in a secular manner which in many respects is antithetical to the basic principles of Satmarer Hasidism.

B. Applicability of the I.D.E.A.

The Individuals with Disabilities Education Act (Title 20 U.S.C. § 1400 *et seq.*), hereinafter I.D.E.A., creates an elaborate statutory procedure to assure provision of free and appropriate programs and services to disabled students in the least restrictive educational environment.

Respondents suggest in their Brief in Opposition that the statute should be stricken because there is no evidence in the Record below to suggest that the disabled students within the Village are "incapable of benefiting from regular classroom programs with use of supplementary aids and services" (Brief in Opposition; p.15) That, however, was not the issue in the Courts below. The sole issue before the New York State Court of Appeals was whether the challenged statute was constitutional on its face. No claim was raised in the Complaint that the statute was unconstitutional as applied. The secondary statutory issue of the compatibility of Chapter 748 of the Laws of 1989 with the provisions of the I.D.E.A. was not relevant before the Courts below and is equally irrelevant herein.

C. Duty to Create Homogeneous School Districts

Respondents have not identified any obligation arising under the Federal Constitution which requires states to create large, heterogeneous public school districts. Education is perhaps the most important of the functions reserved by the United States Constitution to the respective states. If a state legislature chooses to create a public school district from amongst the territory of another, there is no federal constitutional requirement that the resulting school district be heterogeneous in its student composition. Indeed, there could be no such constitutional obligation where, by reason of geography or freedom of association a great majority of inhabitants of a particular geographic area share a common racial, ethnic or religious identification. Furthermore, those cases in which this Court has refused to allow local officials to carve out new school districts from amongst the property of existing districts have each involved school districts in the process of dismantling dual school systems pursuant to the direction of this Court in *Brown v. Board of Education*, 347

U.S. 483 (1955). Cf. *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972); *U.S. v. Scotland Neck City Board of Education*, 407 U.S. 484 (1972). Thus, they are not relevant hereto.

NECESSITY TO REVISIT THE LEMON TEST

It is extremely difficult for governmental entities whose conduct is constrained by limitations inherent in the Establishment Clause to assess the validity of their proposed actions within the context of the *Lemon* test. Similarly, once action is taken, subordinate courts have openly questioned whether *Lemon*, or, more particularly, whether the various components of the three-pronged test, are still applicable as the theoretical framework for assessing the constitutionality of governmental action against the core principles inherent in the Establishment Clause. This Court's failure to cite and apply *Lemon* in its recent opinions in *Lee v. Weissman*, 505 U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) and in *Zobrest v. Catalina Foothills School District*, ___ U.S. ___, 113 S.Ct. 2462 (1993), lends credence to the suggestion that a majority of the Justices of the Court may wish to revisit *Lemon* and to consider its continued viability.

Petitioner acknowledges the difficulty of identifying core principles including coercive and non-coercive activities which fall short of establishing a state religion. However, the current test, if indeed *Lemon* is still viable, provides a variable and inconsistent vehicle for assessing the constitutionality of governmental action, because ephemeral perceptions, e.g. the label which the "objective observer" places upon a set of facts often defines the legitimacy of the enterprise.

This case provides an appropriate vehicle for revisiting the *Lemon* test. This Court should take such opportunity and grant the Petition for a Writ of Certiorari.

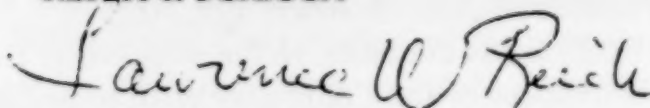
CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York should be granted.

Dated: Northport, New York
November 4, 1993

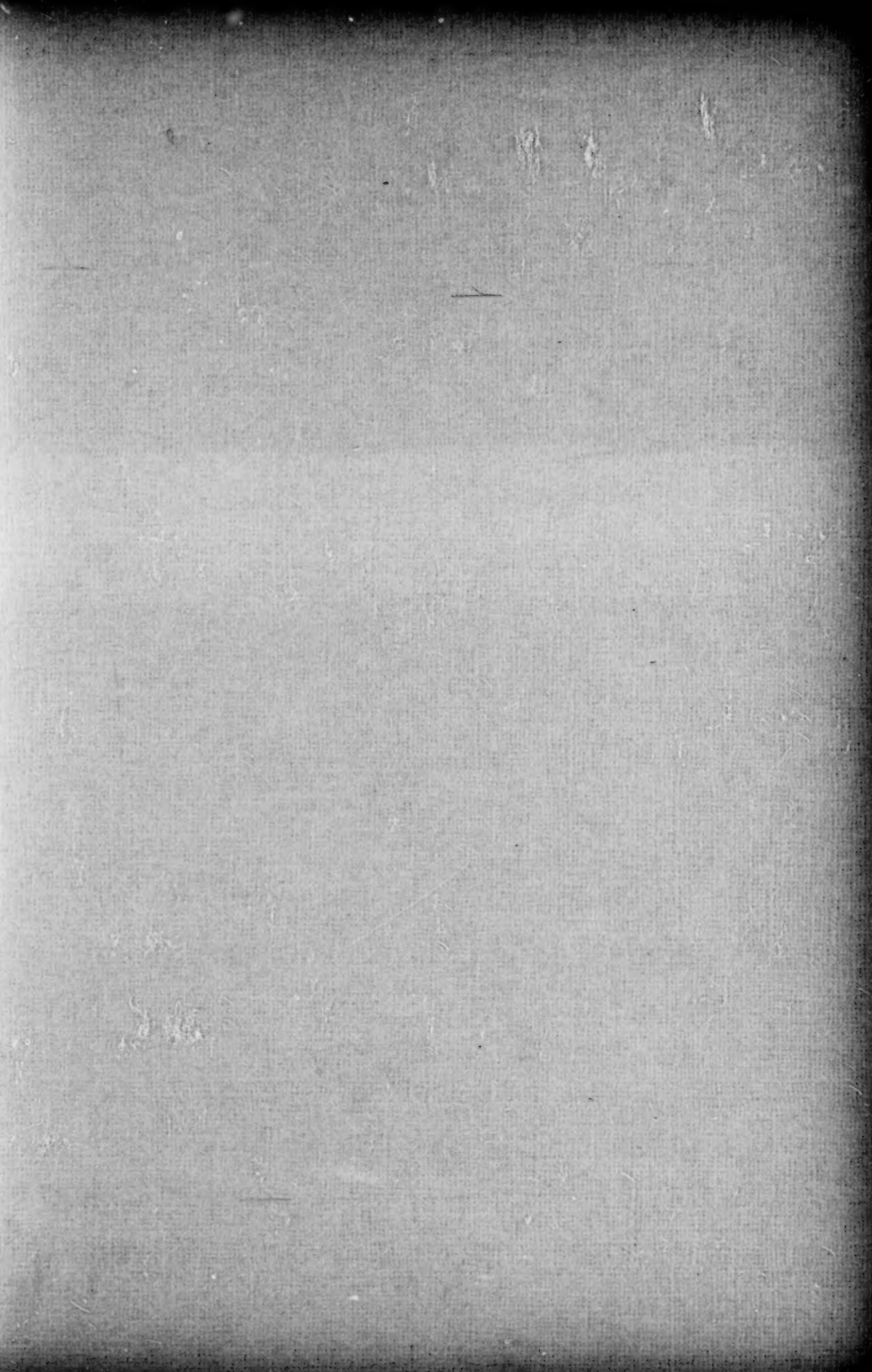
Respectfully submitted,

INGERMAN, SMITH, GREENBERG,
GROSS, RICHMOND, HEIDELBERGER,
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A handwritten signature in cursive script, reading "Lawrence W. Reich".

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(29) (21) (23)
Nos. 93-517, 93-527, 93-539

Supreme Court, U.S.
FILED

JAN 24 1994

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE
SCHOOL DISTRICT, BOARD OF EDUCATION OF THE
MONROE-WOODBURY CENTRAL SCHOOL DISTRICT AND THE
ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Petitioners,

v.

LOUIS GRUMET and ALBERT W. HAWK,
Respondents.

On Writ of Certiorari to the
New York Court of Appeals

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 30, 1993,
IN NO. 93-517 AND OCTOBER 1, 1993, IN NOS. 93-527 AND 93-539
CERTIORARI GRANTED NOVEMBER 29, 1993

101PP

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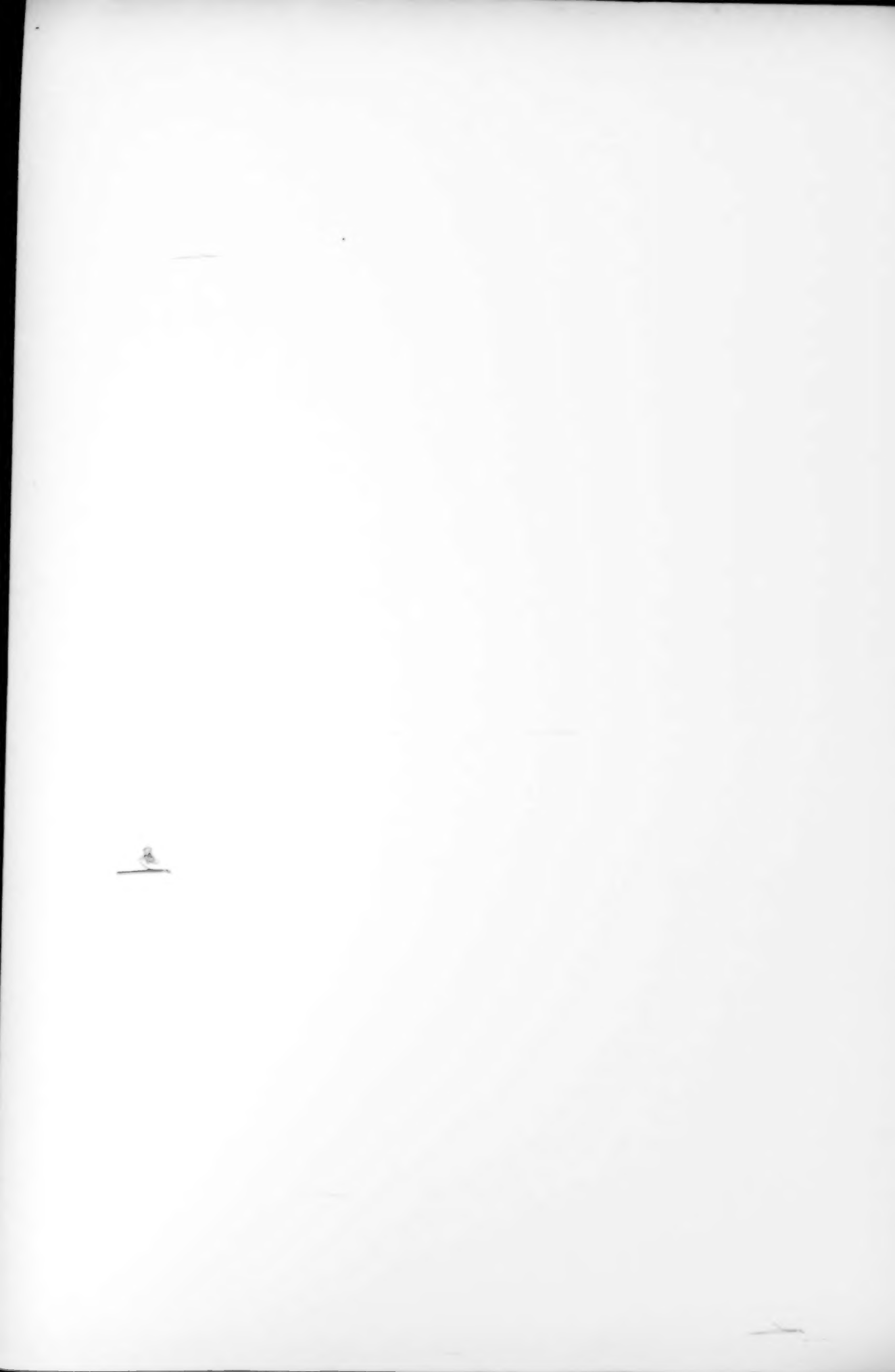


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 Director of Pupil Personnel Services
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Affidavit of Dr. Steven M. Benardo,
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Affidavit of Gregory Illenberg,
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Order of United States Supreme Court
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DOCKET ENTRIES

Date	PROCEEDINGS
1/19/90	Complaint filed.
2/12/90	Answer filed.
2/14/90	Motion to Intervene filed by Board of Education of the Monroe-Woodbury Central School District.
2/27/90	Plaintiffs' Opposition to Motion to Intervene by the Board of Education of the Monroe-Woodbury Central School District filed.
3/5/90	First Amended Complaint filed.
3/8/90	Motion to Intervene filed by Board of Education of the Kiryas Joel Village School District.
3/14/90	Plaintiffs' Opposition to Motion to Intervene by Board of Education of the Kiryas Joel Village School District filed.
3/26/90	Answer to First Amended Complaint filed.
4/19/90	Oral argument on motions to intervene; Court grants motions from bench and orders plaintiffs to file a Second Amended Complaint adding intervenors as defendants.

Date	PROCEEDINGS
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4/26/90	Second Amended Complaint filed.
5/3/90	Answer to Second Amended Complaint filed by Board of Education of the Kiryas Joel Village School District.
	Answer to Second Amended Complaint and Counterclaim filed by Board of Education of the Monroe-Woodbury Central School District.
5/7/90	Answer to Second Amended Complaint filed by State Defendants.
5/10/90	Written Order Permitting Intervenor-Defendant Status entered.
5/23/90	Plaintiffs' Answer to Counterclaim filed.
8/21/90	Stipulation and Order discontinuing action as against State Defendants and providing for Attorney General of New York to continue to appear in action pursuant to Executive Law § 71 entered.
4/25/91	Stipulation withdrawing Counterclaim filed.
5/3/91	Motion for Summary Judgment filed by Plaintiffs.

DatePROCEEDINGS

- 6/21/91 Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment filed by Defendant Board of Education of the Kiryas Joel Village School District.
- Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment filed by Defendant Board of Education of the Monroe-Woodbury Central School District.
- Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment filed by the Attorney General of New York.
- 7/19/91 Opposition to Defendants' Cross-Motions for Summary Judgment filed by Plaintiffs.
- 1/22/92 Trial court's opinion granting summary judgment for Plaintiffs and denying summary judgment for Defendants.
- 2/10/92 Order and Judgment declaring Chapter 748 of the Laws of 1989 unconstitutional entered in the Albany County Clerk's Office.
- 2/14/92 Notice of Appeal filed by Board of Education of the Kiryas Joel Village School District.

Date	PROCEEDINGS
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2/19/92	Notice of Appeal filed by the Board of Education of the Monroe-Woodbury Central School District.
3/6/92	Motion to Vacate Statutory Stay Pending Appeal filed by Plaintiffs.
3/10/92	Notice of Appeal filed by Attorney General of New York.
5/1/92	Order of Appellate Division, Third Department, denying Motion to Vacate Statutory Stay.
12/31/92	Opinion and Order of Appellate Division, Third Department, affirming trial court's order, decided and entered.
1/6/93	Notice of Appeal filed by Board of Education of the Kiryas Joel Village School District.
	Notice of Appeal filed by Board of Education of the Monroe-Woodbury Central School District.
1/11/93	Notice of Appeal filed by the Attorney General of New York.

Date**PROCEEDINGS**

- | | |
|---------|--|
| 1/21/93 | Motion to Vacate Statutory Stay Pending Appeal and for Leave to Cross Appeal filed by Plaintiffs. |
| 2/25/93 | Order of New York Court of Appeals denying Plaintiffs' Motion to Vacate Statutory Stay and for Leave to Cross Appeal. |
| 7/6/93 | Opinion of New York Court of Appeals affirming order of Appellate Division as modified. |
| 7/8/93 | Remittitur of New York Court of Appeals entered. |
| 7/12/93 | Order to Show Cause and Application for Stay filed by Board of Education of the Kiryas Joel Village School District.

Order to Show Cause and Application for Stay filed by Board of Education of the Monroe-Woodbury Central School District. |
| 7/15/93 | Oral Order by Judge Smith (New York Court of Appeals) extending statutory stay pending determination of Defendants' Applications for Stay. |

Date**PROCEEDINGS**

- 7/19/93 Order by Judge Smith (New York Court of Appeals) denying Defendants' Applications for Stay.
- 7/20/93 Application to Stay Mandate of the New York Court of Appeals submitted by Board of Education of the Kiryas Joel Village School District to Justice Clarence Thomas as Circuit Justice for the Second Circuit.
- Application to Stay Mandate of the New York Court of Appeals submitted by Board of Education of the Monroe-Woodbury Central School District to Justice Clarence Thomas as Circuit Justice for the Second Circuit.
- 7/21/93 Order by Justice Clarence Thomas staying judgment of New York Court of Appeals pending receipt of response and further order of the Court.
- Opposition to Applications to Stay Mandate filed by Plaintiffs.
- 7/26/93 Order of the Supreme Court granting applications for stay of the judgment of the New York Court of Appeals pending timely filing and disposition by the Court of a petition for writ of certiorari.

Date**PROCEEDINGS**

9/30/93	Petition for Writ of Certiorari filed by Board of Education of the Kiryas Joel Village School District.
10/1/93	Petition for Writ of Certiorari filed by Board of Education of the Monroe-Woodbury Central School District. Petition for Writ of Certiorari filed by the Attorney General of New York.
10/29/93	Opposition to Petition for Writ of Certiorari filed by Respondents.
11/29/93	United States Supreme Court grants Writs of Certiorari.

SUPERVISOR, TOWN OF MONROE
ORANGE COUNTY, NEW YORK

x

IN RE MATTER OF THE FORMATION
OF A NEW VILLAGE TO BE
KNOWN AS

"KIRYAS JOEL"

x

DECISION ON SUFFICIENCY OF PETITION

ROGERS, W.C., Supervisor

There has been presented to the undersigned a petition framed under the provisions of the Village Law of this State to form a new village within the bounds of the Town of Monroe. The name of the village is proposed to be KIRYAS JOEL, which roughly translated means "Community of Joel."

The petition was presented to me on November 8, 1976. Notice of the required public hearing on that petition was published in the Monroe Gazette on November 11th and November 18th, 1976. A copy of the same Notice was posted in five public places within the territory to be carved out as a new village on November 15, 1976. The public hearing on the petition was held on December 2, 1976 in the basement of Garden Apartment #5 on Quickway Road in Section I of the Monwood Subdivision, the principal area of the village to be. The petition, affidavits of posting and

publishing, written objections and the verbatim transcript of the testimony of the hearing are filed herewith.

Before relating to the technical niceties of the petition and the objections thereto, the reasons for this new birth should somehow be set down so that present and future residents of this 177 year old Town¹ may know why there is now a third village in their midst.² This decision seems to be a most appropriate place to do so.

The traditional elements that underlie the self incorporation of a new municipality are principally the desire and need of residents of a more densely populated area for municipal services which in the past were usually not available at the hands of a Town or County. The desired services were usually water supply, police protection, fire protection and sewer systems. The laws of this State have changed considerably in the last 50 years and all these services are now available through the Town, and in many cases are being supplied by both Town and Counties throughout the State. Thus, the need for self-incorporation into villages has, for the most part, disappeared. A cursory review of State records indicates that there have been only nine villages formed in the entire State since the end of World War II. The area to be included in this new village is now served by a town water and sewer district (privately maintained but subject to Town takeover). It will shortly be incorporated into the operation of Orange County Sewer District #1. It finds police protection from the nearby

¹ Monroe was created by act of the Legislature adopted in 1799 under the name "Cheesecocks".

² The Village of Monroe was incorporated in 1894; the Village of Harriman in 1914.

barracks of the New York State Police. It has fire protection from the Mombasha Fire Company, the same Company that serves the Village of Monroe. Its roads are more than adequately maintained by the Town of Monroe Highway Department and the area is subject to every Town wide protective ordinance or local law that this Town has enacted. Why then is there a need to incorporate?

The answer to this question lies in the makeup of the individuals who will reside within this new village, should I approve this petition. These residents are and will be all of the Satmar Hasidic persuasion. They dress, worship and live differently from the average Monroe citizen. In and of itself these facts are of no moment. Perhaps the Satmar Hasidic manner of dress, means of worship and way of life are more noble than mine or the rest of Monroe's citizenry. Perhaps not. That is not in issue. However, the Satmar believe in large, close knit family units and sociological groups and are accustomed to a highly dense urban form of living, having for the most part been residents of the Borough of Brooklyn in the City of New York since the end of World War II. Furthermore, the sociological way of life for the Satmar Hasidic is one of disdained isolation from the rest of the community. These factors are at the root of their need to incorporate.

When the Satmar leadership chose Monroe as a future place of residence for some of their community, they purchased an already approved but unbuilt upon subdivision that lay within a rural, residential, low-density zoning district set aside for single family homes on 25,000 sq. ft. lots (R-150 district). This district also permitted 80 multiple units of garden apartments. This subdivision was and is still called "Monwood". In constructing the dwellings in Monwood, the Town Board and the Town Building Department felt strongly

that many of the dwellings were converted into two and some three family units and that dwellings under construction were being constructed for two and three units each. We felt these conversions and new construction to be surreptitious and illegal and commenced legal proceedings to compel a reconversion and halt future residential construction until zoning conformance was had. It was a bitter contest opposed at every conceivable step by the Satmars. The legal contest virtually consumed this Town for five months and the cry went up from the other residents of this Town, particularly those of the Northeast area where the Monwood subdivision lies, to enforce our Zoning and Building Codes. The most salient observation was, "If I have to obey the Zoning Law, so do the Satmars".

The Town Board never really understood the reason for the arduous opposition thrown up by the Satmar community to its code enforcement position but felt it lay buried deep in an economic reality that the business leaders could not market the dwellings to their membership unless the cost of maintaining them could be shared by two or three tenants (and their families), whether or not they were related in family groups or were no more than income tenants. Perhaps zoning enforcement might have meant financial ruin for the Monwood business leaders. We felt that those who actually bought or contracted to buy the dwellings had no idea of the Town's zoning restrictions and were unsuspecting objects of the enforcement action.

We also felt that the Town's enforcement position was a rallying point for the Satmar's ingrained feeling of persecution against the Jewish faith. The more the Town sought to enforce, the more it was accused of persecuting the Hasidic Jews. Of course, nothing could be further from the truth. The Satmars were and are welcomed in Monroe as

any new group would be. Their customs were respected and accommodated. They received approval to build a large Synagogue on Forest Road, as well as a private educational complex and religious bath facility. A temporary bath was allowed as were the use of the basements in the garden apartments for schooling pending completion of the permanent facilities. Indeed, there was no problem at all relative to the Satmars in Monroe until the zoning issue. Perhaps this fictitious "persecution" syndrome clouded the real issue more than anything else. It was an erroneous and distinctly unfair invective to toss at the Town's zoning enforcement program.

At any rate the Town's zoning position is well documented in the several law suits that arose in this controversy. (i.e., In the Matter of the Application of Andrew W. Barone; Buchinger v. Moore; Schwartz v. DeAngelis; United Talmudic Association v. Town of Monroe; Monfield Homes, Inc. v. Moore; Hirsch v. Moore; and the several applications decided by the Zoning Board of Appeals.

At the height of the dispute the Satmars presented to me a petition to form a new village of very large dimensions which included many properties and people not of the Satmar belief. The Town Board felt that that attempt at self incorporation was a use of the Village Law to escape the accusing finger of the Town which would at the same time allow the Satmars to enact their own zoning laws designed to suit their economic and sociological needs. The Town realized the strength of the Satmar move in that the Board was, by law, foreclosed from passing upon the public good - or lack of it - in forming such a village, yet (by a split vote) the Board decided to attack the very law that enabled the formation of a village without a decision by the Town from

whence it would be carved upon the public good of such a creation.

At the same time a petition was presented to the Town Board and the Village of Monroe Board of Trustees by the Northeast property owners to annex land around the core of the Monwood subdivision into the Village of Monroe and to do so before action was taken on the new village application, thereby precluding the formation of the new village (a new village cannot be formed within the bounds of another). This led to an attack on that proceeding in United States District Court by means of a "civil rights" suit (Schwartz, et al. v. DeAngelis, et al.), and that in turn led to compromise negotiations between the Satmar leadership and the residents of the northeast section of Town.

After strenuous negotiations virtually all the Northeast property owners and the Satmar group agreed to the formation of a new village on a much smaller scale than originally proposed and one that would not include any one who did not want to be within its bounds. It was limited to 320± acres owned by the Satmar community. The Town Board acquiesced in that agreement and the present petition is an outgrowth of that compromise.

To me, and I believe to the Town Board, the compromise is almost as distasteful as the dispute it settled. The Satmar Hasidim has taken advantage of an obviously archaic State statute to slip away from the Town's enforcement program without the Town having the slightest possibility of commenting on the inappropriate reasons for formation of the new village. Were the village proposed prior to the accusations or after they were adjudicated, it would be a different matter, but to utilize the self incorporation procedure during the pendency of a vigorously

litigated issue in which the Town has accused the Satmar community of serious and flagrant violations of its Zoning Law, is almost sinister and surely an abuse of the right of self incorporation. I do not believe that the authors of the 106 year old Village Law ever dreamed it would be used for this purpose.

Be that as it may, I am left with the hollow provisions of the Village Law which allow me only to review the procedural niceties of the petition itself. Those niceties are politely set forth in Section 2-206 of the Village Law.

At the public hearing objections were raised as to the validity of the corporate signatures. The essence of the objection is that there is no certificate of authenticity evidencing the signators authority to sign and affix the corporate seal. It is true, there is none. It is also true that for the corporation "Monfield Homes, Inc.", owner of the bulk of the land within the territory, the signature itself is virtually illegible and it is not identified by a typewritten or printed name under the signature itself. This is strange in that all the individual signators are so identified. Yet it is noted that the corporate seal for each corporation is affixed. That in and of itself is a presumption that the signator had authority of the Board of Directors to sign and affix the seal (Section 107 Business Corporation Law). Furthermore, the legislature did not require a certificate of authenticity when specifically setting down how the petition was to be executed (Section 2-202 Village Law). Any such certificate would be surplusage and would evidence proof more than is called for. Cf. Skidmore College v. Cline, 58 Misc. 2d 582, 296 N.Y.S.2d 582 (Sup. Ct., Broome Co., 1969). There was no proof put forth at the hearing to rebutt the presumption of Section 107 Business Corporation Law and the dictates of the statute were carried out. I reject this objection.

The balance of the objections put forth at the hearing and outlined in the written objections of Lillian Roberts submitted at that hearing go to the questionable public interest of that proposal. While the boundaries of the new village may be distorted and the property rights of the objectant somewhat endangered, I am foreclosed from entertaining or ruling on such objections, cf. Rose v. Barraud, 61 Misc. 2d 37, 305 N.Y.S.2d 721, aff'd. 36 A.D.2d 1025, 322 N.Y.S.2d 1000. As much as I would like to deal with the public interest question of this proposal and how I feel that it will endanger an otherwise rural residential neighborhood of Monroe, by law, I cannot. I therefore must reject these objections also.

Although not in writing, there were objections put forth at the hearing relating to the failure of the map submitted with the petition to show the Monwood Lake or pond and the corresponding property right of the objectants to that Lake or pond. There is no requirement for a boundary map, no less the showing of ponds or other topographical features. A boundary map is optional (Section 2-202 1.C (1) Village Law), if the petition is supported by a metes and bound description. Aside from the fact that it is not in writing, I must reject this objection also. I find the petition to otherwise conform with the requirements of Section 2-202 of the Village Law.

Accordingly, I will approve the petition as I must within the limits of the law I am given to work with. With this approval I hope that a new era of well being will spring up between the Satmar community and the rest of Monroe and that the Satmar will realize that in order to survive at all in Monroe or elsewhere they must begin to adopt to some of the ways of life of the people in whose midst they have chosen to reside. For the Satmars to believe that they are

above or separate from the rules and regulations that Monroe has chosen to live by or try to impose their mores upon the community of Monroe, or to hide behind the self-imposed shade of secrecy or cry out religious persecution when there is none, will only lead to more confrontations as bitter as the one this decision purports to resolve. I hope that will not be the case.

The petition is approved and the Town Clerk is hereby directed to begin the procedures for an election within the subject territory, in the manner proscribed by law.

Dated: December 10, 1976
Monroe, New York

/s/ William C. Rogers
William C. Rogers
Supervisor, Town of
Monroe

MONROE-WOODBURY CENTRAL SCHOOL DISTRICT

Resolution of Board of Education

Special Meeting
June 27, 1989

Motion was made by Barbara Moynihan to endorse, support and request passage of Assembly Bill #A8747, the enactment of which will create a public school district with boundaries contiguous with the political boundaries of the incorporated village of Kiryas Joel.

Motion seconded by John Geraghty.

The following board members were present and voted unanimously to approve the resolution:

Roberta Murphy, Board President
Barbara Moynihan, Vice President
John Geraghty
Christopher Kelly
Joseph Maiorana
Hugh McElroen
Eileen Monahan
Carl Onken
Dennis Todd

The following board members elect were also present
and expressed support of the above resolution:

Kevin Carberry
Paul Furey

Absent: Carl Gold

I certify that the above is true and accurate.

/s/ Ilene E. Gilmore
Ilene E. Gilmore, District Clerk
pro tempore

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

[LETTERHEAD OF JOSEPH R. LENTOL,
ASSEMBLYMAN 50TH DISTRICT,
KINGS COUNTY]

July 7, 1989

Dear Governor Cuomo:

I write regarding Assembly Bill 8747 which establishes a new union free school district in Orange County. This legislation ends years of legal battles between the Monroe-Woodbury School District and the residents of the village of Kiryas Joel over how to provide state funded special education programs to the Hasidic children of the county.

The hasidic jewish community hold firmly to its religious tenets. With the enactment of this legislation, bureaucratic entanglements that have prevented the delivery of special education programs to the hasidic kids of the village of Kiryas Joel will end.

In an honest attempt to create access for a group of children, the Monroe-Woodbury School Board voted unanimously in favor of this bill; and the local newspaper in an eloquent editorial acknowledged efforts by all parties to try to solve the problem and, therefore, wholeheartedly offered its support.

As the Assembly sponsor of this legislation, I urge you to grant Executive approval to this legislation. I have enclosed additional information for your review. If you have additional questions, please contact me in my Brooklyn office.

Sincerely,

/s/ Joseph R. Lentol
Joseph R. Lentol

Governor Mario Cuomo
Executive Chamber
State Capitol
Albany, NY 12224

MONROE-WOODBURY CENTRAL SCHOOL DISTRICT

July 12, 1989

Mr. Evan Davis
Counsel to the Governor
Executive Chamber
Albany, NY 12224

Dear Mr. Davis:

On behalf of myself and the entire school board of the Monroe-Woodbury Central School District, I recommend that the governor approve bill #A8747 which creates a school district within the geographic boundaries of the Village of Kiryas Joel. We believe that this bill is advantageous to both communities and it is clearly the desire of both communities that the bill become law.

Because this is in some ways a special situation, it is important to state some basic facts and understandings. The Kiryas Joel community is an incorporated village with a rapidly growing population. In existence for about twelve years, they now have more than 3000 school age children -- all in private parochial schools -- and no doubt will increase by several thousand over the next few years. No non-Hasidic family lives within Kiryas Joel.

It is our understanding that the Kiryas Joel school system will, in effect, be a non-operating school district except for special education services. All other children will

continue to attend their private parochial school and local property taxes and state aid could not and would not be a factor in supporting these schools. If a non-Hasidic child requiring regular education moved into the Kiryas Joel school district's geographic boundaries (and this is virtually impossible) the child would be tuitioned to Monroe-Woodbury or another district.

Handicapped children would be educated utilizing property taxes and appropriate state aid. This special education program would have to conform to all the laws and regulations which govern any other public school.

Our board strongly supports this bill in part because it will allow for the proper education of the Kiryas Joel handicapped children. Also we do not believe that it was ever envisioned that a public school system like Monroe-Woodbury would have within its borders a parochial school population within a specific geographical area (an incorporated village) that eventually will be several times larger than the public school student population. The creation of a separate school district will serve to reduce community tension and lead to productive relationships.

From a financial point of view, Monroe-Woodbury will lose the village property taxes. However, our costs will be reduced and eventually there will be some relatively small modification in state aid as without the Kiryas Joel property wealth and income wealth behind each public school child we will be a poorer district. In the long run we do not anticipate significant loss.

Although created for a unique set of reasons, the new Kiryas Joel school district should be viewed as any other school district in the state. Whatever programs they choose

to run will be governed by the laws and regulations of New York State. I ask for the favorable disposition of this bill and would be pleased to clarify any outstanding issues.

Sincerely,

/s/ Daniel Alexander
Daniel Alexander
Superintendent of Schools

DDA: ig

[Emblem]

New York State
Council of School Superintendents

[LETTERHEAD OMITTED]

July 12, 1989

The Honorable Evan Davis
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Dear Mr. Davis:

On behalf of the NYS Council of School Superintendents we have no opposition to A 8747, Lentol, which will establish a new school district in the village of Kiryas Joel.

As with all school districts in New York State, the Kiryas Joel school district should comply with all rules, regulations, and statutes in New York. The establishment of this new district should not be a mechanism for non-compliance of the rules, regulations & statutes which govern public education.

We appreciate the opportunity to provide input on this matter.

Sincerely

/s/ John H. Bennett
John H. Bennett
Executive Director

JHB/k

THE STATE EDUCATION DEPARTMENT/ [Emblem]
The University of the State of
New York/Albany, N.Y. 12234
Counsel and Deputy Commissioner
for Legal Affairs

July 19, 1989

TO: Counsel to the Governor

FROM: Robert E. Diaz /s/

SUBJECT: A.8747

RECOMMENDATION: Disapproval

REASON FOR RECOMMENDATION:

This bill would create a new Union Free School District in the incorporated village of Kiryas Joel, in the town of Monroe. The bill also establishes a board of education composed of five to nine members elected by the voters of the village who would serve for a period not to exceed five years. The act is to take effect on July first next succeeding the date in which it becomes law.

In creating a new school district, this legislation is defective in that it does not contain the provisions necessary to establish its first board of education. The bill does not establish a specific time for an election, the exact number of board members to be elected initially, prescribe the exact length of their terms of office, or provide for the election of board members in staggered terms of office so that an equal number of members would be elected to the board each year

in accordance with Education Law §1702(1). Because there is no mechanism in the bill for determining how many board members would be elected to the first board of education, the board could not be legally constituted and there would be no legal basis for determining how many board members constitute a quorum or how many votes constitute a majority of the board for purposes of determining whether the board had taken action. Because the bill does not specify whether board members would serve for 3, 4 or 5 year terms, there would be no legal basis for electing the members of the first board of education for a particular term of office. Accordingly, the bill is defective in its establishment of a new union free school district and should be disapproved.

In addition to technical defects in the bill, the State Education Department has broader concerns about the establishment of a public school district that would be coextensive with the village of Kiryas Joel. In a recent decision of the Court of Appeals in Board of Education of the Monroe-Woodbury CSD v. Wieder, 72 NY2d 174, 179 (1988), which addressed a dispute over whether pupils with handicapping conditions residing in the village of Kiryas Joel should be provided services in the public schools, in the religiously affiliated private schools they attend or at a neutral site, the village was described as follows:

"Kiryas Joel is a community of Hasidic Jews. Apart from [it's] separation from the outside community, separation of the sexes is observed within the village. Yiddish is the principal language of Kiryas Joel;" Board of Education of the Monroe-Woodbury CSD v. Wieder, 72 NY2d 174, 179.

The court went on to characterize the education of the village's children as follows:

"...Satmarer children generally do not attend public schools, but attend their own religiously affiliated schools within Kiryas Joel. Boys are enrolled in the United Talmudic Academy (UTA) and girls in Bias Rochel, a UTA affiliate. With an apparent over-all goal that children should continue to live by the religious standards of their parents, Satmarer wants their school to serve primarily as a bastion against undesirable acculturation, as the training ground for Torah knowledge in the case of boys, and in the case of girls, as a place to gather knowledge they will need as adult women.' (citation omitted)" *Id.*, at 179-80.

Census data obtained from the Orange County Department of Planning establishes that every inhabitant of Kiryas Joel is white. As the decision of the Court of Appeals described above confirms, all of its inhabitants are members of one religious sect, the Satmarer Hasidim. In addition, the superintendent of schools of the Monroe-Woodbury Central School District, the district in which Kiryas Joel is currently included, reports that only one student who lives in Kiryas Joel is enrolled in the public schools. All of the remaining school age children living in the village attend private religious schools located within the confines of the village. It should be noted that geographically, the village of Kiryas Joel is well within the boundaries of the Monroe-Woodbury Central School District.

Given the goal of maintaining diversity among the pupils enrolled in the public schools and ensuring that school district boundaries are not drawn in a manner that segregates pupils along ethnic, racial or religious lines, this legislation cannot be supported. Encouraging heterogeneity in the schools is important because it prepares pupils to function in the larger society by fostering tolerance and understanding among children with different backgrounds. In addition, providing such opportunities for children at an early age is critical to a healthy coexistence among the many diverse subcultures that make up our society. Educationally, it is important because it fosters equal opportunities for all children in an environment that provides for the richness of the experience that comes with such diversity.

Because inhabitants of Kiryas Joel have not sent their handicapped children into the public schools, the children of Kiryas Joel have been without special educational services since the Court of Appeals held in the Wieder case that the Monroe-Woodbury school district was neither compelled to provide special education services to their children on the grounds of the private religious school or at a neutral site. It appears that this legislation was advanced in order to allow the newly created school district to provide special education services to children within the district.

Given the nature of the dispute that apparently prompted this legislation, this bill also raises serious constitutional questions regarding potential governmental furtherance of religion in violation of the First Amendment's provision requiring the separation of Church and State. Although representatives of the village assert that they will take extraordinary care to create a special education school devoid of any religious message or teaching, the State would be accommodating the religious beliefs of a particular

religious sect by enacting legislation that furthers its decision to insulate the children of the village from the larger society.

If the real reason for establishing the school district of Kiryas Joel is to establish a separate school for handicapped children, as is apparently the case, such purpose would also be inconsistent with both state and federal laws which entitle these children to a free appropriate education in the least restrictive environment. The least restrictive environment is defined, in part, as one that allows a handicapped child to be educated with non handicapped peers to the maximum extent appropriate (8 NYCRR §200.1[t][2]). Only in those few cases where it is determined by a committee on special education that the individual needs of the child warrant a segregated setting (which is the most restrictive placement) would such a placement be deemed appropriate.

In addition, it must be noted that Union Free School Districts are not expressly authorized under existing statutes to create such schools. Section 1709(24) of the Education Law authorizes a union free school district to provide special classes as defined under §§4401 and 4402 of the Education Law. Section 4401 of the Education Law distinguishes between the creation of special education classes within the public school district and the authority of the union free school district to contract with BOCES and private schools for the education of certain handicapped children who require educational programs in separate school buildings (Educ. Law §4401.2[c][f]).

The existing statutory scheme is not only part of the State Plan approved by the United States Department of Education as required by federal law, it is entirely consistent with both state and federal law mandates that require

placement of handicapped children in the least restrictive environment (20 USC §1401 et seq). By limiting the authority of public schools to create separate schools for handicapped children and requiring the approval of the Commissioner as a prerequisite for placement of such children in segregated facilities, the legislature has created a further check to ensure that only those children who require such settings are placed there.

For all of the above reasons, the State Education Department recommends disapproval of this legislation.

10 DAY BILL

B-201 BUDGET REPORT ON BILLS Session Year 1989SENATE

Introduced by:

ASSEMBLY

No.

Members of Assembly
Lentol and Pataki

No. 8747

Law: Special Act

Sections:

Division of the Budget recommendation on the above bill:

Approve: Veto: X No Objection: No Recommendation: 1-2. Subject, Purpose and Summary of Provisions:

To establish, by special act, the Kiryas Joel Village School District as a separate school district coterminous with the boundaries of the Village of Kiryas Joel, Town of Monroe, Orange County. Such school district is to have all the powers and duties of a union free school district.

If enacted this year, this bill will take effect July 1, 1990.

3. Legislative History:

This appears to be new legislation.

4. Arguments in Support:

At present, the territory of the Village of Kiryas Joel is located within the Monroe-Woodbury Central School District. Since its establishment as an Hasidic Jewish community in Orange County, and its subsequent incorporation as a separate village in 1977, the Hasidic residents of Kiryas Joel have expressed a number of significant concerns to the Monroe-Woodbury school district regarding the transportation and education of their handicapped pupil population. These concerns are primarily attributable to the religious precepts of the Hasidic sect prohibiting the intermingling of male and female children in such situations.

It is our understanding that the intent of this legislation would permit a new Kiryas Joel school board to establish a public school within its boundaries for handicapped pupils only (estimated to serve 100 out of a total pupil population of 3,800). The nonhandicapped student population of Kiryas Joel, which would also come under the general oversight of this new public school board, is expected to continue to attend private schooling currently provided in the Village, with any nonhandicapped students desiring a public school program being "tuitioned-out" to the Monroe-Woodbury school district.

This bill provides a vehicle for resolution of the current conflict between the Monroe-Woodbury school district and the residents of Kiryas Joel through the establishment of the subject school

district, with its own tax base and State aid entitlements. While removing a portion of Monroe-Woodbury's tax base from its rolls, it would also remove a costly (handicapped) educational component from Monroe-Woodbury's budget and the transportation expenses related thereto.

By resolving this issue consistent with the wishes of the involved groups at the local level, it can be argued that this bill is consistent with the State's policy of local control in educational matters. This philosophy is effectively summarized in the 1982 Court of Appeals decision in Levittown v. Nyquist, which states:

For all of the nearly two centuries that New York has had public schools, it has utilized a statutory system whereby citizens and the local level, acting as part of school district units containing people with a community of interest and a tradition of acting together to govern themselves, have made the basic decisions on funding and operating their own schools. Through the years, the people of this State have remained true to the concept that the maximum support of the public schools and the most informed, intelligent and responsive decision-making as to the financing and operation of those schools is generated by giving citizens direct and meaningful control over the schools that their children attend.

5. Possible Objections:

This bill, which gives the new Kiryas Joel school district all the powers and duties of a regular union free school district, if enacted, could establish an undesirable precedent whereby other sects or groups could seek a special legislative chapter to create public school districts in cases where such groups have become disenchanted with the education offered in their existing public school district.*

Furthermore, it can argued that the creation of the Kiryas Joel Village school district could be perceived as an attempt to partition a portion of an existing local property tax base and redirect such funding to support what may constitute a highly private educational purpose. In addition to partitioning off a portion of the local public tax base, the creation of a public school district would also generate additional State aid. (See Item 8 below.)

It can also be strongly argued that the establishment of this new public school district, for the purpose of establishing a separate (public) school for

* At present, union free school districts are established pursuant to the provisions of sections 1522 and 1523 of the Education Law (through petition for request to establish a district, public notice of meeting, public meetings, etc.). Although the Legislature has previously established 16 so-called "special act union free school districts" to provide special education services to handicapped pupils and persons in need to supervision (PINS), these districts do not have their own local real property tax base, taxation powers, or their own local school population. All pupils at such schools are placed by other local school districts, social services districts, or the Family court, and such districts are eligible for only building and transportation aid.

handicapped children, would run afoul of existing State and Federal laws entitling such children to a free and appropriate education in the least restrictive environment. As has been pointed out by the State Education Department, the least restrictive environment is defined, in part, as one that allows a handicapped child to be educated with nonhandicapped pupils to the maximum extent appropriate. The manner in which this handicapped program is to be established appears to preclude the possibility of permitting the placement of such students in less restrictive environments.

Although the Kiryas Joel School Board will be legally bound to operate its programs in accordance with Education Law and Commissioner's Regulations, this unique arrangement will no doubt present the State Education Department with an extraordinary complex task to monitor/audit the operations of this school district to ensure compliance with law. The special circumstances under which this school district has been created may also invite constitutional challenges regarding the possibility of excessive government entanglement with religion.

Further, it can be argued that the creation of a new, small school district runs counter to the State's long-standing goal of encouraging greater economy and efficiency through the consolidation of small school districts.

6. Other State Agencies Interested:

State Education Department
Department of Taxation and Finance

State Board of Equalization and Assessment
Office of the State Comptroller

7. Other Interested Groups:

The New York State School Boards Association has indicated it will be taking no position on this bill but notes that the Monroe-Woodbury school district supports it.

8. Budget Implications:

Based on local wealth data provided by the Monroe-Woodbury school district, and assuming that the 100 special education pupils in the Kiryas Joel school district will be placed in programs qualifying for the high cost component of excess cost aid, we estimate a new Kiryas Joel school district budget of about \$1.3 million and new State aid of about \$400,000-\$450,000. This would leave a local tax bill of about \$900,000. Since Monroe-Woodbury attributes about \$1.4 million of its tax base to the Village of Kiryas Joel, it appears that the Village's tax payers will benefit from both new State aid and lower, local property taxes as a result of the creation of the new district.

Also based on data supplied by Monroe-Woodbury (and current data available from the State Education Department), we estimate that the loss of property and income wealth attributed to the Village of Kiryas Joel will make Monroe-Woodbury poorer to the extent that it will receive operating aid on a formula basis rather than on save-harmless, as it now does. While the increases in State aid to Monroe-

Woodbury, due to its then lower wealth, would not occur until the 1991-92 school year, we project such State aid increases would amount to \$1.4 million.

9. Recommendation:

Based on the fiscal implications of this bill and the undesirable precedent it could establish for the proliferation of other specifically delineated school districts, we recommend this bill be disapproved.

Date: July 21, 1989 Examiner: /s/ Illegible
Disposition: Chapter No. Veto No.

[Emblem]

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

[LETTERHEAD OF SHELDON SILVER,
ASSEMBLYMAN 62ND DISTRICT,
NEW YORK COUNTY]

July 24, 1989

Honorable Mario Cuomo
Executive Chamber
Albany, New York

RE: A.8747

Dear Governor Cuomo:

I am writing to express my strong support for A.8747 which is now awaiting your action.

The bill, if enacted into law, would provide much needed assistance to Hasidic handicapped children residing in the Village of Kiryat Yoel. These youngsters are not getting certain special educational services to which they are legally entitled because the local school board under whose jurisdiction they currently fall have refused to provide these services outside of regular special education programs conducted as part of regular public school programs. Our Court of Appeals has ruled recently that current law, indeed, does not require that these services be provided outside of the existing public school programs.

The bill represents a legislative response to that decision by providing a mechanism through which students will not have to sacrifice their religious traditions in order to receive the services which are available to handicapped students throughout the State.

I am aware that opponents of the bill are raising arguments that this accommodation is violative of the First Amendment. As one who has sponsored many measures seeking to reasonably adjust standard societal practices in order to permit the full participation of religious minorities in the life of our State I have, as you have, heard this argument before. I commend to your attention the fact that it has generally proven to be groundless. I am confident that the same will obtain in this instance.

During your first year as Governor you signed the now famous "GET" law which has helped thousands of women in this State. You did that in spite of hysterical outcries of entanglement. During the past six years that bill has survived the constitutional test. I am confident that the one before you will likewise survive.

Very truly yours,

/s/ Sheldon Silver
SHELDON SILVER
Member of Assembly

SS/smw

FOR RELEASE:
IMMEDIATE, TUESDAY
July 25, 1989

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

July 24, 1989

MEMORANDUM filed with Assembly Bill Number 8747,
entitled:

#58 "AN ACT to establish a separate school
(Chapter 748) district in and for the village
 of Kiryas Joel"

A P P R O V E D

The bill establishes a separate school district for the village of Kiryas Joel located in the town of Monroe, Orange County. The district is placed under the control of a board of education composed of from five to nine members. It is regarded by opponents and proponents alike as a practical solution to what has been, so far, an intractable problem.

Lawyers for the State Education Department argue that the bill may be held to be unconstitutional. My Counsel disagrees and advises that the bill is, on its face, constitutional. I am persuaded by my Counsel's view.

The bill is an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, whose population are all members of

the same religious sect. Almost all of the approximately 3,000 school age children of Kiryas Joel attend private religious schools. However, the village has sought to obtain from the public school district special education services for handicapped children.

Under our Constitution as interpreted by the Supreme Court of the United States such special education services may not be provided at the religious school but may be provided at a neutral site that is not a public school.

There came a time when the school district refused to provide such services to the handicapped children of Kiryas Joel at a neutral site and instead insisted that the children receive the services at a public school. The parents of these children sent them to the public school for a brief period but ultimately refused to continue to do so.

Litigation arose and our Court of Appeals held that the school district could not be compelled to provide special education services at a neutral site. As a result, the approximately 100 handicapped students in the village are not now receiving the special education services they need.

I believe that this bill is a good faith effort to solve this unique problem. And, as noted above, I am advised it is facially constitutional. Of course this new school district must take pains to avoid conduct that violates the separation of church and state because then a constitutional problem would arise in the application of this law. The village officials acknowledge this responsibility. I believe they will be true to their commitment.

The village of Kiryas Joel, the Monroe-Woodbury Central School District and the Orange County Executive recommend approval.

The bill is approved.

(Signed) Mario M. Cuomo

STATE OF NEW YORK
SUPREME COURT
COUNTY OF ALBANY

LOUIS GRUMET, individually and as Executive Director
of the New York State School Boards Association, Inc.;
ALBERT W. HAWK, individually and as President of the
New York State School Boards Association, Inc.; and
the NEW YORK STATE SCHOOL BOARDS
ASSOCIATION, INC.,

Plaintiffs,

v.

NEW YORK STATE EDUCATION DEPARTMENT;
THOMAS SOBOL, as Commissioner of the New York
State Education Department; NEW YORK STATE
BOARD OF REGENTS; EDWARD V. REGAN, as
New York State Comptroller; EMANUEL AXELROD, as
District Superintendent of Orange-Ulster BOCES;
BOARD OF EDUCATION OF THE KIRYAS JOEL
VILLAGE SCHOOL DISTRICT; BOARD OF
EDUCATION OF THE MONROE-WOODBURY
CENTRAL SCHOOL DISTRICT,

Defendants.

Index No. 1054-90
RJI No. 0190-021649

Assigned Justice:

SECOND AMENDED COMPLAINT

Plaintiffs by their attorneys, Jay Worona, Esq., Deputy Counsel and Director of Litigation Services and Cynthia Plumb Fletcher, Esq., Assistant Counsel, for the New York State School Boards Association, as and for a second amended complaint, amended by order and direction of the court upon hearing argument on motions to intervene in open court on April 19, 1990, respectfully allege as follows that:

PARTIES

1. Plaintiff Louis Grumet is a resident of New York State who resides at 123 Lincoln Avenue, Altamont, New York, and has paid and is paying both state income and state sales taxes. Plaintiff Grumet is thus a "citizen-taxpayer" as defined in Article 7-A of the State Finance Law and as such is a person who is and may be affected or specially aggrieved by the activity herein referred to, and maintains this action for declaratory relief and permanent injunction against officers and employees of the state who in the course of their duties have caused, are now causing and are about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property.

2. Plaintiff Grumet is Executive Director and chief executive officer of the New York State School Boards Association, Inc. (hereinafter also referred to as "NYSSBA" or "the Association"), and also maintains this action on behalf of NYSSBA and its members, as authorized by direction of NYSSBA's President after consensus was reached by the Board of Directors on January 6, 1990, and

by ratification of the Board of Directors on February 16, 1990.

3. Plaintiff Albert W. Hawk is a resident of New York State who resides at 52 Lincoln Avenue, Dansville, New York, and has paid and is paying both state income and state sales taxes. Plaintiff Hawk is thus a "citizen-taxpayer" as defined in Article 7-A of the State Finance Law and as such is a person who is and may be affected or specially aggrieved by the activity herein referred to and maintains this action for declaratory relief against officers and employees of the state who in the course of their duties have caused, are now causing and are about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property.

4. Plaintiff Hawk is President of NYSSBA and serves without compensation as chairman of the Association's Board of Directors, and also maintains this action on behalf of NYSSBA and its members, as authorized by consensus of the Board of Directors on January 6, 1990 and by ratification of the Board of Directors on February 16, 1990.

5. Plaintiff NYSSBA is a not-for-profit membership corporation incorporated under the laws of the State of New York located at 119 Washington Avenue, Albany, New York, whose membership consists of approximately 760 or 98 percent of the public school districts of New York State. Pursuant to Section 1618 of the Education Law of New York State, NYSSBA has the responsibility of devising practical ways and means of obtaining greater economy and efficiency in the administration of public school district affairs and projects. As such, NYSSBA is duly authorized to conduct programs

and activities in the interest of its member school districts. See Op. Counsel, 1 Ed.Dept.Rep 718 (1951).

6. One activity conducted by NYSSBA on behalf of its members is the submission of amicus curiae briefs and the institution of legal actions where the decisions in such cases will have relevant statewide or national significance for NYSSBA's members, New York State school districts, and public school districts throughout the United States. NYSSBA has participated in many state and federal judicial and administrative proceedings involving both the New York State and the nation's public schools. In all instances, NYSSBA's decision to participate in litigation is dependent upon whether the outcome of the action will have statewide significance that will have an impact upon the Association's members.

7. Included among those cases in which NYSSBA has participated are Matter of Bd. of Educ., Commack Union Free School District v. Ambach, 70 NY2d 501 (1987); Bd. of Educ., Monroe-Woodbury Central School District v. Wieder, 132 AD2d 409 (2d Dept. 1987), mod. 72 NY2d 174 (1988); NYSSBA v. Corchran, S.Ct., Alb. Co., No. 3132-89 decision dated Nov. 3, 1989; New York State School Boards Assn. v. Sobol, Supreme Court, Albany County, No. 6657-89, filed Oct. 24, 1989, decision pending; Detsel v. Bd. of Educ. of the Auburn Enlarged City District, 820 F2d 587 (2d Cir. 1987); Catlin v. Ambach, 820 F2d 588 (7th Cir. 1987); Mozert v. Hawkins County Public Schools, 827 F2d 1058 (6th Cir. 1987). Many such actions have involved issues similar to those of the instant case including, but not limited to, constitutional separation of church and state, statutory validity, and state and federal laws regarding the education of children with handicapping conditions. The issues in the

present case also have great statewide significance to plaintiff Association's members.

8. Plaintiff NYSSBA's board of directors, at its September 15, 1989, at its January 6th, 1990 meeting, and at its February 16, 1990 meeting, discussed the implications of Assembly Bill No. 8747, recently signed into law and recorded as Chapter 748 of the Laws of 1989, which is the subject of this action (hereinafter also referred to as "the bill"). Plaintiff Association's board of directors discussed the state-wide importance of the constitutional and statutory issues implicated by the subject legislation, and the implications of these issues on the governance of the education of all children in New York State. The Association's board further considered the dangerous precedent which will be set by the subject legislation. One such precedent will be the creation, on behalf of a special interest group, of a public school district comprised of a culturally, ethnically, and religiously isolated population.

9. As a result of the above-described discussions, at its January 6, 1990 meeting, the plaintiff Association's board of directors reached a consensus and its president directed its Executive Director, plaintiff Louis Grumet, to pursue this present action contesting the constitutional and statutory validity of Chapter 748 of the Laws of 1989 which involves issues affecting the interests of plaintiff's member school boards. (Draft of Minutes of Board of Director's January 5-6th 1990 meeting, attached hereto as Exhibit A).

10. On January 19, 1990, this action was commenced by personal service of a Summons and Complaint on all the named defendants in this action, and on the New York State Attorney General. An Answer to the Complaint by the Attorney General on behalf of all the

named defendants was served on plaintiffs and received on February 14, 1990.

11. At its February 16, 1990 meeting, plaintiff NYSSBA'S Board of Directors formally ratified and authorized any and all past, present and future action taken by NYSSBA's staff on behalf of the Association in regard to its challenge of the constitutionality and validity of Chapter 748 of the Laws of 1989. (Draft of minutes of Board of Directors February 16, 1990 meeting attached hereto as Exhibit B).

12. Defendant Thomas Sobol, as Commissioner of Education (hereinafter referred to as "the Commissioner"), is the chief executive officer of the State Education Department and of the Board of Regents, and is charged with specific powers and duties including the enforcement of all general and special laws relating to the education system of the state and the execution of all educational policies determined by the Board of Regents. (Educ. L. sec.305).

13. Defendant Board of Regents governs and exercises the corporate powers of the University of the State of New York (Educ. L. sec.202), and is authorized "to encourage and promote education" (Educ. L. sec.201), to "exercise legislative functions concerning the education system of the state," and to approve any "rules or regulations or amendments or repeals thereof, adopted or prescribed by the Commissioner of Education." (Educ. L. sec.207).

14. Defendant State Education Department is an administrative agency of the State of New York, and is charged with the general management and supervision of all public schools and of all of the State's educational work, including the exercise of all powers and duties of the

Commissioner of Education and the Board of Regents.
(Educ. L. Art.3).

15. Defendant Edward V. Regan, as Comptroller of the State of New York, is the chief fiscal officer of the State and chief administrative officer of the Office of the State Comptroller (OSC), an independent, constitutional office. (N.Y.S. Const. Art.V, sec.1). The Comptroller has the duty to audit all moneys of the State and all moneys in the possession, custody or control of any officer, agent or agency of the State, before such moneys may be paid, expended or refunded. (State Finance L. sec.III). The defendant Comptroller is thus charged with the audit and control of any state moneys appropriated by the State Education Department for New York State's public school districts.

16. Defendant Emanuel Axelrod is Executive Officer of the Orange-Ulster Board of Cooperative Educational Services (hereinafter referred to as "BOCES"), and District Superintendent of the Orange-Ulster Supervisory District. As part of defendant Axelrod's responsibilities, he oversees the establishment of new school districts within his jurisdiction, including but not limited to, the Kiryas Joel Village School District at issue in this case.

17. Boards of Cooperative Educational Services exist, and are created for the purpose of carrying out programs of shared educational services for the schools within their respective supervisory districts and for providing instruction to students within the component districts in such subjects as the Commissioner of Education may approve. Such educational services may include the operation of special classes for children with handicapping conditions (Educ. L. sec.1950).

18. Defendant Axelrod, as District Superintendent, is charged with the general supervision of the dependent school districts within the jurisdiction of the Orange-Ulster Supervisory District. Such supervision includes the appointment of a competent person to fill a vacancy on school boards of any of the school districts within his supervisory district, where such vacancies are not filled by election within thirty days after such vacancies occur (Educ. L. sec.2113).

19. Boards of education of dependent school districts within defendant Axelrod's supervisory district may not appoint their own superintendents of schools without the express recommendation of defendant Axelrod. Boards of education of school districts that have applied for and have met the criteria for attaining "independent school district" status, are authorized to appoint a superintendent of schools without the recommendation of the District Superintendent. (Educ. L. sec.1711).

20. Pursuant to Chapter 748 of the Laws of 1989, the New York State Legislature established a union free school district to be known as the Kiryas Joel Village School District, effective as of July 1, 1990. The school district will be located within the territory of the Village of Kiryas Joel, in the Town of Monroe, Orange County, and will fall within defendant Axelrod's supervisory district.

21. Defendant Board of Education of the Kiryas Joel Village School District was elected on January 17, 1990 by the residents of the Village of Kiryas Joel, under the supervision of Defendant District Superintendent Axelrod and other officials of the Defendant State Education Department.

22. Plaintiffs maintain that Chapter 748 of the Laws of 1989 is defective in that it did not provide for the time or manner of the election of such board. Further, because of the insufficiency of said statute, any action taken by such board on behalf of the Kiryas Joel Village School District prior to the statute's effective date of July 1, 1990, is statutorily unauthorized.

23. The Kiryas Joel Village School District is presumptively a "dependent" school district since such district does not meet the criteria enumerated by the State Education Department which would authorize the district to appoint its own superintendent of schools, independent of the District Superintendent's recommendation. (See "Standards of Enumeration for Authority to Appoint a Superintendent of Schools," memorandum of the State Education Department, attached hereto as Exhibit C).

24. As such the Kiryas Joel Village School District is scheduled to fall within the jurisdiction of the Orange-Ulster Supervisory District, and will be under the general supervision of Defendant District superintendent Emanuel Axelrod. Defendant Axelrod is therefore also charged with the duty of recommending a superintendent of schools for appointment by the Kiryas Joel School Board.

25. Defendant Board of Education of the Monroe-Woodbury Central School District (hereinafter referred to as "Defendant Monroe-Woodbury") is a body corporate, organized and existing pursuant to the Education Law, and as such is responsible for the governance and administration of educational programs and services to students residing within the territorial boundaries of the Monroe-Woodbury Central School District in Orange County, New York. The Defendant Board of Education of the Monroe-Woodbury

Central School District is currently one of plaintiff NYSSBA's member school boards.

26. Currently, the Village of Kiryas Joel is located within the Monroe-Woodbury Central School District, and will continue to be part of such district until July 1, 1990, the effective date of the subject bill, at which time the Village of Kiryas Joel is scheduled to become a separate school district. Thus the children living within the Village are, and have been, entitled to receive a free, public school education at Monroe-Woodbury schools. Furthermore, Kiryas Joel children with handicapping conditions are, and have been entitled to receive free, appropriate educational services at Monroe-Woodbury schools.

27. The Defendant Monroe-Woodbury school board claims to have always stood, ready and willing to provide appropriate educational services to any and all school age children living within the Village of Kiryas Joel, on the premises of the Monroe-Woodbury Central School District's public schools.

28. Upon information and belief, it was and is the intent of the Legislature and of the residents of the Village of Kiryas Joel to establish a public school, pursuant to the provisions of the subject bill, for the sole purpose of educating handicapped children of school age who live within the Village of Kiryas Joel and that the residents will continue to send all other nonhandicapped students to their private religious schools. (See Letter to Gov. Cuomo from Joseph R. Lentol, Assembly Sponsor of A.B. No. 8747, dated July 7, 1989; newspaper articles from The Times Herald Record, Monroe County, dated January 5, 9, 15, 16, 1990; attached hereto as Exhibit D). This population of children with

handicapping conditions is currently estimated at approximately 100 children.

BACKGROUND

29. Kiryas Joel is a community of Hasidic Jews of the Satmar sect. In addition to separation from outside communities, separation of the sexes is observed within the Village, except within the confines of immediate families. Separation of the sexes is also observed within the private religious schools. However, according to Satmar Hasidic beliefs, there is no requirement that children with handicapping conditions be separated by sex while receiving special education services.

30. Yiddish is the principal language of the residents of Kiryas Joel: television, radio and English language publications are not in general use. The dress and appearance of the Hasidim are distinctive -- the boys, for example, wear long side curls, head coverings and special garments, and both males and females follow a prescribed dress code.

31. The Village of Kiryas Joel (hereinafter also referred to as "the Village"), was incorporated in 1977. Its current population of approximately 8500 residents consists exclusively of Satmar Hasidim. As such, the Village of Kiryas Joel is comprised of a culturally, ethnically and religiously isolated population.

32. Upon information and belief, all of the land within the Village is privately owned (see Tax Map of the Village of Kiryas Joel filed with the Village incorporation report submitted to the New York State Department of State, attached hereto as Exhibit E). The village contracts with

surrounding towns and villages for such services as police, fire and highway maintenance.

33. Satmar children of Kiryas Joel do not attend public schools, but attend their own religiously affiliated schools within Kiryas Joel. Two of those private religious schools are the United Talmudic Academy (UTA), which is attended by boys, and Bais Rochel, a UTA affiliate, which is attended by girls.

34. Upon information and belief, all of the Kiryas Joel handicapped children continue to receive special services, under private arrangements.

35. It is a basic tenet of the Satmar Hasidic sect that children should continue to live by the strict religious standards of their parents. "Satmarer want their school to serve primarily as a bastion against undesirable acculturation, as a training ground for Torah knowledge in the case of boys, and in the case of girls, as a place to gather knowledge they will need as adult women." (Rubin, Satmar: An Island in the City, 140 [Quadrangle 1972].)

36. Satmar Hasidim have been involved in three recent court disputes involving the above described religious beliefs, two in federal and one in state courts. Two of these cases involved the Satmar Hasidim of Kiryas Joel.

37. In Parents' Assn. of P.S. 16 v. Quinones (803 F2d 1235 (2d Cir. 1986)), the Second Circuit preliminarily enjoined the implementation of a plan by the New York City Board of Education designed to provide federally-funded remedial education for handicapped girls from the Beth Rochel School in New York City. At the request of the parents of Satmar Hasidic children, the New York City

Board had agreed to close off nine classrooms of a public school, and to dedicate the enclosed area to the exclusive use of Hasidic girls. The teachers were all to be female, Yiddish-speaking public school teachers. In granting the preliminary injunction, the court found a substantial likelihood that parents of public school students would succeed in their challenge to the arrangement under the Establishment Clause of the First Amendment to the federal Constitution. Ultimately the court held the plan to separate the Hasidic students from all other public school students was an unconstitutional accommodation of Hasidic religious beliefs and traditions.

38. In Bollenbach v. Bd. of Educ. of the Monroe-Woodbury Central School Dist. (659 F.Supp 1450 (SDNY 1987)), female bus drivers complained that the Monroe-Woodbury School District, (defendant herein), had violated the Establishment Clause by accommodating the religious beliefs of United Talmudic Academy students in the Village of Kiryas Joel. The accommodation made by Monroe-Woodbury involved the removal of senior, female bus drivers from transportation runs servicing male Hasidic students to their religious school. The District Court found that the deployment of only male drivers had the primary effect of advancing religious beliefs.

39. The third case originated in the spring of 1984, when the Monroe-Woodbury Board of Education, (defendant herein), met with representatives of the Village of Kiryas Joel to develop procedures for the classification and delivery of services to the handicapped children of the Village. After extensive negotiations, the Monroe-Woodbury Board agreed to furnish various services and programs, characterized as "health and welfare" services (see Educ. L. sec.912), at a "neutral site" within Kiryas Joel; actually an

annex to the Bais Rochel school, under the auspices of the UTA. While such services were being provided, the handicapped children of Kiryas Joel were not separated by sex, but were taught exclusively with other Hasidic children.

40. A year later, however, reacting to the United States Supreme Court's decisions in Aguilar v. Felton (473 US 402 (1985)) and School Dist. of Grand Rapids v. Ball (473 US 373 (1985)), the Monroe-Woodbury School Board, (defendant herein), terminated those arrangements. In those cases the United States Supreme Court held that public school teachers could not constitutionally provide educational services to school children on the premises of private, parochial schools.

41. The Monroe-Woodbury Board, (defendant herein), concluded that it could provide appropriate services to Kiryas Joel handicapped children only in the public schools. The Monroe-Woodbury Board proceeded to place the affected children in classes within its public schools, based on individual evaluations made by its Committee on the Handicapped (CSE), pursuant to Educ.L. Art.89).

42. Initially the Kiryas Joel handicapped children attended the public school programs and classes, but after several months, their parents refused to permit them to continue attending the public schools.

43. In November 1985, the Monroe-Woodbury Board of Education, (defendant herein), commenced an action against certain Kiryas Joel parents who were demanding that their handicapped children be provided with educational services at their chosen "neutral site," for a declaration that the Monroe-Woodbury Board lacked statutory authority to provide such services except within regular

public school classes. In that action, entitled Board of Educ. of Monroe-Woodbury CSD v. Wieder, 134 Misc.2d 658 (1987), the Monroe-Woodbury Board asserted that, pursuant to Education Law section 3602-c, a board is authorized to provide the services at issue to children attending nonpublic schools, only in regular classes of the public schools.

44. Despite pending administrative review proceedings instituted earlier by some of the parents of Kiryas Joel handicapped children, those parents joined the Wieder defendants in the litigation, contending that the declaratory relief sought by the Monroe-Woodbury Board, (defendant herein), was inconsistent with its legal obligations. The Wieder defendants demanded both an injunction directing the Monroe-Woodbury Board to furnish services in classes conducted on the premises of the Bais Rochel school their children attended for their normal educational instruction, and damages equal to the parents' own payments for substitute services.

45. Both sides sought summary judgment. The Wieder defendants urged in their submissions that the regular public schools were inappropriate not only because of the need of many of their children for one-on-one services, but also because of the panic, fear and trauma the children suffered in leaving their own community, and in being educated in an environment by and with people whose ways were so different from their own. The Wieder defendants described specific instances of the children's anxiety and distress, contending that the parents felt compelled to withdraw their handicapped children from the services offered in public schools because the emotional toll outweighed the benefits of the programs.

46. The Monroe-Woodbury Board, (defendant herein), in its summary judgment submission, disputed the Wieder defendants' factual assertions, pointing to the progress made by Satmar children of Kiryas Joel who actually attended the public school programs. The Monroe-Woodbury Board detailed efforts to integrate the children and accommodate the parents (including Yiddish-speaking aides and bilingual reports), and concluded that Satmar Hasidic children of Kiryas Joel had been, and could continue to be, appropriately educated in the public schools.

47. The Monroe-Woodbury Board, (defendant herein), also insisted that Education Law section 3602-c(9) leaves school boards no other option but to provide such educational services on public school premises. Section 3602-c(9) provides that nonpublic school pupils shall be provided educational services in regular public school classes, and not separately from pupils regularly attending the public school.

48. In its decision, the New York State Supreme Court, Orange County, directed the Monroe-Woodbury Board, (defendant, herein), to provide educational services to the Kiryas Joel handicapped children at a site not physically or educationally identified with, but reasonably accessible to the Satmar Hasidic children (134 Misc. 2d 658, 663).

49. The court avoided interpreting section 3602-c(9), either regarding its applicability or its validity, simply holding that the statute could not deny the children's right under constitutional, statutory and decisional law, to services outside regular public school classrooms.

50. The Wieder defendants' claim for damages was dismissed as premature, owing to a failure to exhaust administrative remedies.

51. An appeal was brought before the Appellate Division, Second Department (132 AD2d 409 (2d Dept. 1987)), at which time NYSSBA, (plaintiff herein), entered the Monroe-Woodbury action as an amicus curiae and argued that the alternate site which the Kiryas Joel parents requested for their handicapped children was not truly "neutral" because it was to be utilized exclusively by members of the Hasidic sect. The Appellate Division modified the Supreme Court's decision to the extent of granting the Monroe-Woodbury Board's, (defendant herein), cross motion for summary judgment, and dismissing the Wieder defendants' counterclaim.

52. The Appellate Division also declared that Education Law section 3602-c(9) requires that, to the maximum extent appropriate for the individualized educational needs of each child, the Monroe-Woodbury Board (defendant herein), must provide special education and related services in the regular classes and programs of its public schools, and not separately from public school students (132 AD2d 409, 417-418).

53. In denying the Wieder defendants' counterclaim, the Appellate Division concluded that the "neutral site" contemplated by the Supreme Court's order would in reality contravene the Establishment Clause of the First Amendment.

54. The Appellate Division also observed that, "quite apart from the above discussion, the order and judgment must fall because it constitutes an improper

usurpation of the [Monroe-Woodbury Board's] legislatively ordained authority pursuant to Education Law article 89 to evaluate and place handicapped children in special education programs according to their individual needs (see, Education Law 4402)." (132 AD2d 409, 416).

55. An appeal was brought before the New York State Court of Appeals in which NYSSBA also participated as amicus curiae taking the same position it had taken before at the lower court level.

56. On appeal, the New York State Court of Appeals modified and affirmed the opinion of the Appellate Division. (72 NY2d 174 (1988)). The Court of Appeals held that Education Law section 3602-c(9) does not mandate that a board can only provide special services to private school handicapped children in regular classes and programs of the public schools.

57. However, the Court of Appeals also held that although the Monroe-Woodbury Board, (defendant herein), was not required by Education Law sec. 3602-c(9) to provide educational services to children with handicapping conditions only within the public schools, the board was also not required, as the Wieder defendants contended, to provide services within the Kiryas Joel students' own schools, or even at a neutral site. On this point, the Court indicated that such a general compulsion would be inconsistent with the regulatory scheme of the federal Education of the Handicapped Act (EHA) (20 USC sec. 1400 et seq.) which requires education of handicapped children to occur in the environment that is the least restrictive for each individual handicapped child, and by definition this would not be the least restrictive environment.

58. At the Court of Appeals, the defendants in Wieder also argued that the Monroe-Woodbury Board's public school placement interfered with the free exercise of their sincere religious beliefs, guaranteed by the state and federal Constitutions (NY Const. art I. sec.3; U.S. Const., 1st Amdmt). The Wieder defendants argued that, as a result of compelling their children to attend regular public school classes and programs, they were forced to choose between following the precepts of their religion and foregoing benefits on the one hand, and accepting benefits while violating their religious beliefs on the other.

59. Regarding this issue, the Court of Appeals held that the defendants in Wieder had made no showing that any sincere religious beliefs were threatened by requiring limited public school attendance, only for special services, and that there was therefore no basis for the constitutional right asserted by the Wieder defendants, and recognized by the trial court.

60. The Court of Appeals held that the statutory entitlement to special services does not carry with it a constitutional right to dictate where such services must be offered.

LEGISLATION

61. On July 24, 1989, Assembly Bill Number 8747 was signed into law creating a new union free school district within the territory of the Village of Kiryas Joel, in the town of Monroe, Orange County. (Attached hereto as Exhibit F). This new law, contained in Chapter 748 of the Laws of 1989, will take effect on July 1, 1990.

62. The creation of a school district by special act of the legislature is one of various ways by which a new school district can be created. Upon information and belief, there are approximately 20 school districts created by special act of the legislature.

63. In the past, the legislature has exercised this authority most commonly for the purpose of creating a public school out of part or all of a private, charitable institution which services only handicapped, emotionally disturbed, or other children with special needs. (See, e.g., Town of Greenburgh, UFSD No. 13, Chapter 559 of the Laws of 1972; Town of Mt. Pleasant UFSD, Chapter 843 of the Laws of 1970; attached hereto as Exhibit G).

64. Unlike the school district created by the legislation at issue, school districts created by special act of the legislature for the sole purpose of educating handicapped or other children with special needs are usually coterminous with such private institutions.

65. There are generally no actual residents of such district except residents of the institution, and the district's board of trustees is elected by the institution's private corporate board. Without having actual residents within such district, there is also no tax base. Such school district's funding, therefore, is provided primarily through state and federal funding. In addition, Some local school districts may fund, in part, their resident students who attend such special act school districts. Chapter 566 of the Laws of 1967 provides for the funding of this type of district. Legislation which creates such school districts subsequent to 1967, amends Chapter 566 of the Laws of 1967 (see Chapter 566 of the Laws of 1967, attached hereto as Exhibit H, and see Exhibit G). The Kiryas Joel Village School District, created

by the legislation in question, could not be considered a "special act school district" as referenced in Article 81 of the Education Law, because such legislation does not reference Chapter 566 of the Laws of 1967 as amended.

66. Children who require the special services provided by such schools can only be placed in the institutions comprising these school districts by family courts, social services departments or divisions for youth or other school districts located throughout the state. Such school districts are not intended to service the educational needs of a general, public school population.

67. The Gananda School District, as contained in Chapter 928 of the Laws of 1972 (attached hereto as Exhibit I), is a school district established by special act of the legislature which does not fall within the same category as do the districts described above. For example, the Gananda School District provides general educational services to students in kindergarten through twelfth grade, has a residential tax base, and was carved out of already existing school districts, as opposed to being coterminous with a particular institution.

68. Unlike the Gananda School District, the Kiryas Joel Village School District was not intended to, and upon information and belief, will not service a general public school population and will not provide education for students other than handicapped students. (See Exhibit D).

69. Unlike the bill in question, the Gananda bill that created the Gananda School District was extremely detailed. The bill provided the exact geographical dimensions of the district, specific organization procedures including procedures for the election of the first board of education

pursuant to the Education Law, as well as provisions for the apportionment and payment of state aid. The legislation in question does not contain such provisions.

70. In addition, the Gananda bill specifically provided, consistent with the goals of the Education Law, that an ethnically, culturally, and religiously diverse school district population was to be encouraged. The legislation in question does not contain such provision.

71. Moreover, upon information and belief, the population of Kiryas Joel is exclusively comprised of Satmar Hasidim, and will remain as such because all parcels of land are owned by members of the Hasidic sect. Accordingly, the composition of the Kiryas Joel Village School District population will also consist exclusively of Satmar Hasidim, and will not be ethnically, culturally or religiously diverse.

72. According to a memorandum written by the Governor and filed with the contested Assembly Bill Number 8747, the bill was enacted into law as a "practical solution to what has been an intractable problem." (See "Memorandum filed with Assembly Bill Number 8747," State of New York, Executive Chamber, dated July 24, 1989, attached hereto as Exhibit J). The memorandum indicates that the "intractable problem" refers to a "longstanding conflict between the Monroe-Woodbury School district and the Village of Kiryas Joel, whose population are all members of the same religious sect." The memorandum clearly indicates that the bill was intended to correct a problem which has developed due to religious concerns. In other words, the legislation at issue was intended to accommodate religious concerns.

73. In his Memorandum, the Governor acknowledged that lawyers for the defendant State Education

Department had argued that the bill may be held to be unconstitutional. (See Exhibit J). However, the Governor chose not to accept this viewpoint.

74. The bill jacket which accompanies the bill in question contains numerous memoranda and letters from outside groups, urging the Governor to veto the bill based upon allegations that the bill violates the prescribed separation of church and state. (See, e.g., State Education Department memorandum, dated July 19, 1989; American Jewish Congress memorandum, dated July 13, 1989; New York Civil Liberties memorandum, undated; New York State United Teachers memorandum, dated July 12, 1989; attached hereto as Exhibit K).

75. The bill jacket memorandum by the State Education Department also contains allegations that the bill is statutorily defective and inconsistent with both state and federal laws which entitle handicapped children to a free appropriate education in the least restrictive environment. (See Exhibit K, SED memorandum, citing 20 USC §1401 et seq.; 8 NYCRR §200.1[t](2)).

76. The least restrictive environment is defined, in part, as one that allows a handicapped child to be educated with nonhandicapped peers to the maximum extent appropriate (8 NYCRR §200.1[t](2), and see Educ.L. Art. 89 and 20 USC §1401 et. seq.). Only in those few cases where it is determined by a school district's committee on special education that the individual needs of the child warrant the most restrictive placement, would a segregated setting be deemed an appropriate placement. (See Exhibit K, SED memorandum).

77. Upon information and belief, the Kiryas Joel Village School District, which is intended for the sole purpose of providing educational services to handicapped children living within the Village, will not necessarily provide the least restrictive environment for all such children. As a result, the legislation in question violates the express intent and provisions of both state and federal laws relating to the education of handicapped children.

78. The bill jacket also contains the Division of the Budget's recommendation on this bill urging the Governor to veto the bill citing as possible objections that the bill, if enacted could establish, ". . . an undesirable precedent whereby other sects or groups could seek a special legislative chapter to create public school districts in cases where such groups have become disenchanted with the education offered in their existing public school district." (Division of Budget's Report, dated July 21, 1989, attached hereto as Exhibit L).

79. Furthermore, the Division of the Budget indicated that the creation of the Kiryas Joel Village School District could be perceived as an attempt to partition a portion of an existing local property tax base and redirect such funding to support what may constitute a highly private educational purpose. In addition to partitioning off a portion of the local public tax base, the creation of a public school district would also require additional State aid. (See Exhibit L).

80. The Division of the Budget also noted that it can be strongly argued that the establishment of this new public school district, for the purpose of establishing a separate, publicly funded school district for handicapped children, would run afoul of existing state and federal

requirements of appropriate education in the least restrictive environment. (See Exhibit L).

81. In its Report, the Division of the Budget set forth that, although the Kiryas Joel Village School Board will be legally bound to operate its programs in accordance with the Education Law and with the Commissioner's Regulations, this unique arrangement will no doubt present the State Education Department with the extraordinary, complex task of monitoring the operations of this school district to ensure compliance with the law. The special circumstances under which the Kiryas Joel Village School District has been created may also invite constitutional challenges of excessive government entanglement with religion. (See Exhibit L).

82. Upon information and belief, the inhabitants of Kiryas Joel claim their handicapped children are entitled to the special education services which the Court of Appeals in Wieder had held that the Monroe-Woodbury School District, (defendant herein), was not compelled to provide to such children, either on the grounds of the private religious school or at a neutral site.

AS AND FOR A FIRST CAUSE OF ACTION

83. Upon information and belief, the legislation in question was thus advanced in order to create a public school which would provide publicly funded special education services to Kiryas Joel handicapped children within the confines of the Village. The bill in question therefore allows all residents of the Village of Kiryas Joel to acquire the remedy which they sought and were denied in all judicial proceedings based, in part, upon constitutional standards.

84. Upon information and belief, by its enactment of the contested legislation, the State has accommodated and is accommodating the religious beliefs of a particular religious sect. The creation of a school district that will service only children within the Satmar Hasidic village of Kiryas Joel furthers the Hasidim's centrally held religious belief of insulating the children of the Village from the larger, diverse outside society. The bill therefore has as its purpose, and/or will have as its primary effect, the promotion of religion in violation of the Establishment Clause of the First Amendment (Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971)).

85. Upon information and belief, the bill will also violate the Establishment Clause by causing those state officials and agents charged with the duty of monitoring the newly created school district, to become excessively entangled in matters of religion. (See Lemon, *supra*).

86. Upon information and belief, since the contested legislation establishing a separate school district for Kiryas Joel follows the Court of Appeals' decision in Wieder, *supra*, which held that the state was not constitutionally mandated to provide remedial education to handicapped Hasidic children in the parochial school they usually attend; and the U.S. Supreme Court decisions in Grand Rapids and Aguilar, which held that public school teachers could not constitutionally provide educational services on the premises of parochial schools, the unconstitutional intent of the legislation is apparent.

AS AND FOR A SECOND CAUSE OF ACTION

87. Plaintiffs repeat, reiterate and reallege paragraphs numbered one through eighty-one inclusive hereof with the same force and effect as if set forth at length herein.

88. Upon information and belief, the contested legislation is also violative of the 14th Amendment to the U.S. Constitution in that the U.S. Supreme Court has determined that a state may not carve out a new school district from an existing district when such an effort will have the effect of creating a segregated school. (Wright v. Council of City of Emporia, 407 U.S. 451, 92 S. Ct. 2196 (1972); United States v. Scotland Neck City Bd. of Ed., 407 U.S. 484, 92 S.Ct. 2214 (1972)).

AS AND FOR A THIRD CAUSE OF ACTION

89. Plaintiffs repeat, reiterate and reallege paragraphs numbered one through eighty-three inclusive hereof with the same force and effect as if set forth at length herein.

90. Upon information and belief, the bill also violates Article 11, sec.3 of the New York State Constitution in that it authorizes the expenditure of state moneys and resources for purposes of aiding and maintaining a school under the control and direction of a religious denomination, or a school in which a denominational tenet or doctrine will be taught, i.e., the doctrine of keeping Hasidic children separate and apart from the outside community.

91. Upon information and belief, the provision of a public education to an intentionally isolated ethnic, racial and religious group is also in direct contravention of the

stated goals and purposes of the New York State Education Law. (See Exhibit K, memorandum of the SED).

AS AND FOR A FOURTH CAUSE OF ACTION

92. Plaintiffs repeat, reiterate and reallege paragraphs numbered one through eighty-six inclusive hereof with the same force and effect as if set forth at length herein.

93. Upon information and belief, since the legislation in question was enacted solely to establish a separate school for the handicapped children of Kiryas Joel, such purpose is inconsistent with both state and federal laws which entitle handicapped children to a free appropriate education in the least restrictive environment.

AS AND FOR A FIFTH CAUSE OF ACTION

94. Plaintiffs repeat, reiterate and reallege paragraphs numbered one through eighty-eight inclusive hereof with the same force and effect as if set forth at length herein.

95. Upon information and belief, the legislation in question is further defective in that it does not contain the provisions necessary to properly establish a new union free school district.

96. Upon information and belief, the legislation in question fails to provide the authority or procedures for establishing the first Kiryas Joel Village School District board of education.

97. Upon information and belief, due to the lack of proper legislative provision for establishing a new union free school district or the first board of education, action has been taken and public taxpayer dollars and resources have been expended by defendants to establish such school district and board of education including but not limited to the election of school board members, without the proper legal authority, which would constitute an improper delegation of authority and expenditure of state monies and resources in violation of New York State Constitution Article 8, §1.

98. Upon information and belief, any and all action taken with respect to the organization, establishment, maintenance or control of the Kiryas Joel Village School District without specific legislative authority, prior to July 1, 1990, the effective date of the subject legislation, is unauthorized and should be declared null and void since no such action has been provided for prior to that date.

AS AND FOR A SIXTH CAUSE OF ACTION

99. Plaintiffs repeat, reiterate and reallege paragraphs numbered one through eighty-three inclusive hereof with the same force and effect as if set forth at length herein.

100. Upon information and belief, the contested legislation creates an undesirable precedent whereby other sects or groups can now seek a special legislative chapter to create public school districts in cases where such groups have become disenchanted with the education offered in their existing public school district.

101. Upon information and belief, plaintiff has no adequate remedy at law.

WHEREFORE, plaintiffs request that they may have a judgment as follows:

1. That the court declare that Chapter 748 of the Laws of 1989 entitled: "An Act to establish a separate school district in and for the Village of Kiryas Joel" is unconstitutional in that it violates the establishment clause of the First and Fourteenth Amendments, the Equal Protection Clause of the Fourteenth Amendment, and Article 11, section 3 of the N.Y.S. Constitution.

2. That the court declare that Chapter 748 of the Laws of 1989 entitled: "An Act to establish a separate school district in and for the village of Kiryas Joel" is statutorily defective in that it does not properly establish a union free school district pursuant to the provisions contained in the New York State Education Law.

3. That the court declare that any and all actions taken prior to July 1, 1990, the effective date of Chapter 748 of the Laws of 1989, for the purpose of establishing, organizing, maintaining or controlling the Kiryas Joel Village School District are null and void for lack of specific statutory or other legal authority.

4. That the court declare that any and all actions taken prior to July 1, 1990, the effective date of Chapter 748 of the Laws of 1989, establishing the first Kiryas Joel Village School District board of education are an unlawful delegation of authority for lack of specific statutory or other legal authority.

5. That the court declare that Chapter 748 of the Laws of 1989 entitled: "An Act to establish a separate school district in and for the Village of Kiryas Joel" violates the

existing State and Federal laws entitling children with handicapping conditions to a free and appropriate education in the least restrictive environment.

6. That because Chapter 748 of the Laws of 1989 fails to provide specific statutory authority regarding the establishment, organization, maintenance or control of the Kiryas Joel Village School District prior to July 1, 1990, the effective date of Chapter 748 of the Laws of 1989, the court declare that the expenditure of any and all state or local government monies or resources for such purposes violates Article 8 §1 of the New York State Constitution as being an unlawful and unauthorized usage of public monies or resources.

7. That the Court declare that the expenditure of any and all state or local government monies or resources for purposes of aiding or maintaining the Kiryas Joel Village School District, in which the Hasidic tenet or doctrine of keeping Hasidic children separate and apart from outside communities, violates Article 11, §3 of the New York State Constitution.

8. That the court order that the defendants be permanently restrained and enjoined from taking any and all present and future action or expending any and all monies or resources for the purpose of implementing Chapter 748 of the Laws of 1989.

9. That the court order that the defendants be permanently restrained and enjoined from taking any and all present and future action or expending any and all monies or resources that would result in the creation or establishment of a new public school district that will service a select, isolated and religiously, ethnically and culturally nondiverse

population; and/or which would provide educational services to handicapped children other than in the least restrictive environment, pursuant to state and federal law.

10. That the court order that the plaintiffs shall have such other and further relief that the court may deem just and proper, together with the costs and disbursements of this action.

Dated: Albany, New York
April 26, 1990

JAY WORONA, ESQ.
CYNTHIA P. FLETCHER, ESQ.
Attorneys for Plaintiffs
New York State School
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[TITLE OMITTED IN PRINTING]

AFFIDAVIT OF HON. THOMAS SOBOL,
COMMISSIONER OF EDUCATION

STATE OF NEW YORK)

) ss.:

COUNTY OF ALBANY)

THOMAS SOBOL, being duly sworn, deposes and
says:

1. I am Commissioner of Education and am the chief executive officer of the state system of education and of the Board of Regents. As such, I am charged with the general supervision over the public schools and maintenance of a statewide system of public education that complies with state and federal law, and the educational policies established by the Board of Regents (Educ. L. § 305). I am personally familiar with the facts set forth herein.

2. The State Education Department (hereinafter also referred to as "SED" or "the Department"), is an administrative agency of the State of New York, and is charged with the general management and supervision of all public schools and of all of the State's educational functions, including the exercise of all powers and duties of the Commissioner of Education and the Board of Regents. (Educ. L. Art.3).

3. The Board of Regents governs and exercises the corporate powers of the University of the State of New York (Educ. L. sec.202), and is authorized "to encourage

and promote education" (Educ. L. sec.201), to "exercise legislative functions concerning the education system of the state," and to approve any "rules or regulations or amendments or repeals thereof, adopted or prescribed by the Commissioner of Education." (Educ. L. sec.207).

4. The Kiryas Joel Village School District (hereinafter also referred to as "KJVSD"), was created by special act of the legislature. Chapter 748 of the Laws of 1989 was signed into law on July 24, 1989 and became effective July 1, 1990. The KJVSD is a dependent school district within the Orange-Ulster Supervisory District, and is a component district of the Orange-Ulster Board of Cooperative Educational Services (BOCES).

5. Emanuel Axelrod is Executive Officer of the Orange-Ulster Board of Cooperative Educational Services, and District Superintendent of the Orange-Ulster Supervisory District. Within the jurisdiction of the Orange-Ulster Supervisory District, Dr. Axelrod has responsibility to oversee the establishment of new school districts, to appoint persons to fill vacancies on school boards where such vacancies are not filled by election within thirty days, and to maintain general supervision over dependent school districts, including recommendations of specific candidates for appointment as school district superintendents to the boards of such dependent districts. Boards of education of dependent school districts may not appoint their own superintendents of schools without such express recommendation.

6. At the time the KJVSD was created by act of the Legislature, it was known that the district was being created in a community that consisted exclusively of inhabitants of the same religious sect. (See, Governor's

Memorandum filed with Assembly Bill No. 8747, attached as Exhibit J to Second Amended Complaint). The KJVSD is the only school district in the State of New York whose inhabitants are all members of the same religious sect.

7. A memorandum, submitted on behalf of the Department to the Governor's counsel on July 19, 1989, reflected my concerns regarding the establishment of the KJVSD and recommended disapproval of the bill. (See, State of Education Department Memorandum, hereinafter referred to as "Department's Memorandum," attached as Exhibit K to Second Amended Complaint).

8. The Department's Memorandum to the Governor's Counsel voiced strong opposition to the legislation, based not only on the insular nature of the school district, but also on the basis that its mere existence raised major constitutional problems. (See Department Memorandum). As the memorandum also indicates, the creation of a school district coextensive with a village inhabited exclusively of individuals of the same religious sect is contrary to public policy which encourages heterogeneity in the schools, as well as

...the goal of maintaining diversity among the pupils enrolled in the public schools and ensuring that school district boundaries are not drawn in a manner that segregates pupils along ethnic, racial or religious lines... (See, Department Memorandum at p.3)

9. Another concern expressed in the Department's Memorandum was the fact that the legislation circumvents the Court of Appeals decision in Monroe-Woodbury v. Wieder, 72 NY2d 174 (1988), wherein the Court rejected the

claims of the residents of Kiryas Joel to have their children with handicapping conditions educated either on the grounds of their parochial school or, at a minimum, within the boundaries of their village.

10. As the Department's Memorandum indicates, from the time of the Court of Appeals decision, until the creation of the KJVSD, the inhabitants of Kiryas Joel had not sent their handicapped children into the public schools to receive the services to which they were entitled. As the Department's Memorandum concludes,

[i]t appears that this legislation was advanced in order to allow the newly created school district to provide special education services to children within the district after the parents had failed to persuade the Court of Appeals that, to do otherwise, violated their constitutional rights.

11. As the Governor recognized when signing the Act into law, "this new school district must take pains to avoid conduct that violates the separation of church and state." Based on similar concerns, the State Education Department not only monitors special education at KJVSD, but also monitors the district to ensure that public funds are not expended to further religion.

12. To ensure that public funds are not expended to further religion in violation of both the Federal and State Constitutions, my staff in its monitoring capacity is unavoidably entangled in matters of religion. For example, SED monitors the use of public funds to support the KJVSD transportation services to ensure that the children and their bus drivers are not separated by sex which a federal district

court found to violate the Establishment Clause. (See, Bollenbach v. Board of Education of the Monroe-Woodbury Central School District, 659 F.Supp 1450 (SDNY 1987)).

13. A separate concern raised in the Department's Memorandum was that,

[i]f the real reason for establishing the school district of Kiryas Joel is to establish a separate school for handicapped children, as is apparently the case, such purpose would also be inconsistent with both state and federal laws which entitle these children to a free appropriate education in the least restrictive environment. The least restrictive environment . . . allows a handicapped child to be educated with nonhandicapped peers to the maximum extent appropriate. . . Only when it is determined by a committee on special education that the individual needs of the child warrant a segregated setting (which is the most restrictive setting) would such a placement be deemed appropriate.

14. With respect to the mandate that children with handicapping conditions be educated in the least restrictive environment, the Act presents additional problems for the Department because it created a union free school district for the express purpose of providing special education and related services to the handicapped children of KJ. As the Department's Memorandum indicates, state law governing union free school districts does not provide authority for such districts to establish schools exclusively for students with handicapping conditions. Rather it

distinguishes between the creation of special education classes within the public school district and the authority of a union free school district to contract with BOCES and approved private schools for the education of certain handicapped children who require educational programs in separate school buildings . . .

As the memorandum further explains, the purpose of

limiting the authority of public schools to create separate schools for handicapped children[,] and requiring the approval of the Commissioner as a prerequisite for placement of such children in segregated facilities [was to provide] a further check to ensure that only those children who require such settings are placed there...

Therefore, the creation of the KJVSD as a union free school district to establish, by design, a separate school exclusively for children with handicapping conditions without regard to the severity of their handicapping condition or their need for placement in a school serving only children with disabilities, is contrary to the intent and prescription of both state and federal law that mandates placement of children with disabilities in the least restrictive environment.

15. Now that the Kiryas Joel Village School District has been established, my staff cannot ensure compliance with state and federal laws for the children with handicapping conditions who reside there because the district provides no opportunities for them to be educated with non-handicapped children.

16. Furthermore, a school district established to serve 100 handicapped children (see, Exhibit J to Second Amended Complaint) contravenes the State's Master Plan for School District Reorganization in New York State, (hereinafter also referred to as "the Master Plan"), pursuant to § 314 of the Education Law which promotes the reorganization and consolidation of smaller school districts to encourage economy and efficiency in New York State's system of public education. As of October, 1990, there were 33 students enrolled in the KJVSD. According to the latest count, 20 of these students are non-residents thereby undermining the Master Plan.

17. The State Education Department asserts that the creation of the Kiryas Joel Village School District involved an accommodation to the residents of Kiryas Joel who insisted upon the receipt of special education and related services in their own village or not at all rather than within the school district in which they were a part and were fully entitled to the services. Such accommodations have never been made for the parents of other handicapped children in

the State of New York, or to my knowledge anywhere in the country.

/s/ Thomas Sobol
Hon. Thomas Sobol
Commissioner of Education

Sworn to before me this
1st day of May, 1991.

Jay Worona /s/
Notary Public

Jay Worona
Notary Public, State of New York
Qualified in Albany County
No. 4785288
Commission Expires Nov. 30, 1991

[TITLE OMITTED IN PRINTING]

**AFFIDAVIT OF HANNAH FLEGENHEIMER,
DIRECTOR OF THE DIVISION OF PROGRAM
MONITORING, OFFICE FOR THE
EDUCATION OF CHILDREN WITH
HANDICAPPING CONDITIONS**

STATE OF NEW YORK)

) ss.:

COUNTY OF ALBANY)

HANNAH FLEGENHEIMER, being duly sworn,
deposes and says:

1. I am the Director of the Division of Program Monitoring of the Office for Education of Children with Handicapping Conditions (OECHC) of the New York State Education Department (SED). I have worked in the Division since 1977 and in my present capacity since 1983. I am responsible for supervising the 48 members of the Division's staff and oversee State monitoring of special education services to children with handicapping conditions. The monitoring staff is assigned to five Regional Offices throughout the state and is responsible for monitoring special education programs in public school districts, Boards of Cooperative Educational Services (BOCES), state-approved private schools, state-supported and state-operated schools, and other state agencies to ensure that they comply with the applicable state and federal laws and regulations governing the education of children with handicapping conditions.

2. I received an Ed.D. in Special Education from Teachers College, Columbia University in 1974; a Masters in Education from Teachers College, Columbia University in 1972; and an M.A. in Psychology from Teachers College, Columbia University in 1968. From 1971-1977 I taught in the Department of Special Education at Teachers College, Columbia University.

3. I am fully familiar with the facts set forth herein.

4. The education of children with handicapping conditions is governed by the Individuals with Disabilities Education Act (IDEA), 20 USC §1400 et seq. and its implementing regulations, 34 CFR Part 300 et seq.; the Rehabilitation Act of 1973, §504 (29 USC §§794-794(c)) and its implementing regulations at 34 CFR 99; and by Article 89 of the New York State Education Law, and its accompanying regulations, 8 NYCRR Part 200, as well as the general requirements applicable to all school districts as defined in Part 100 of the Commissioner's Regulations.

5. The IDEA confers upon children with handicapping conditions an enforceable substantive right to a free appropriate public education, and conditions federal financial assistance upon a state's compliance with the substantive and procedural requirements of the Act. All states are required under the Act to provide to children with disabilities a "free appropriate public education which emphasizes special education and related services designed to meet their unique needs . . ." (20 USC §1400(c)).

6. Article 89 of the Education Law, §4401 et seq., with its accompanying regulations, is the vehicle which implements federal law governing the rights of children with disabilities in New York State.

7. A "free appropriate public education" means that "special education" and "related services" must be provided at public expense, in conformity with an "individualized education program" (IEP), tailored to meet the unique needs of the child with handicapping conditions. (20 USC §1401(18)). Furthermore, the law requires that educational services be provided in the "least restrictive environment," appropriate to the needs of the student. (20 USC §1412(5)(B); 8 NYCRR 200.1). (See discussion below starting at paragraph 10).

8. "Related services" include "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education." (20 USC §1401(17); 34 CFR 300.13(a); 8 NYCRR 200.1(dd)).

9. All students with handicapping conditions are entitled to receive a free appropriate education in the district where they reside. To meet its obligation, a school district must provide a written recommendation or "individualized education program" (IEP) for each child with a handicapping condition, which must be based on a comprehensive evaluation of the child and developed in a meeting of the school district's "Committee on Special Education" (CSE). The school district must identify the school program in which such services will be provided and delineate the other programs considered and why they were not chosen. (20 USC §1401(19); 34 CFR 300.343 and 34 CFR 300.344; Educ.L. §4402(1)(b)(1) and 8 NYCRR 200.4).

10. Because placement in the school closest to a child's home is considered the least restrictive, a child must be placed within the home school whenever an appropriate educational program is available there. (Application of a Handicapped Child, 26 Educ.Dept.Rep. 59, 61 (1986)).

11. The obligation to provide special education and related services in the "least restrictive environment" requires, to the maximum extent appropriate, that children with handicapping conditions are educated with non-handicapped children in as close proximity as possible to the student's place of residence; and that "special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." (20 USC §1412(5)(B); 8 NYCRR 200.1; and see Application of a Child with a Handicapping Condition, 30 Educ. Dept. Rep. 64 (1990); Application of a Handicapped Child, 26 Educ.Dept.Rep. 118 (1986)).

12. It is a violation of state and federal law to remove a pupil from regular classroom instruction unless it is determined that, even with support services, the child would not benefit from instruction in the regular classroom. It is the policy of the State Education Department, as required by federal law, to ensure that even students who cannot benefit from instruction in a regular classroom, are nonetheless educated in public school buildings to ensure them opportunities to interact with their non-handicapped peers in nonacademic areas (i.e., recess, lunch, music, art, gym, etc.). (See Application of a Child with a Handicapping Condition, 29 Educ.Dept.Rep. 1 (1989)), Application of a Child with a Handicapping Condition; 29 Educ.Dept.Rep.

223 (1990); Application of a Child with a Handicapping Condition; 29 Educ.Dept.Rep. 160 (1989); Application of a Child with a Handicapping Condition; 30 Educ.Dept.Rep. 64 (1990); Application of a Child with a Handicapping Condition; 30 Educ.Dept.Rep. 108 (1990)).

13. To ensure that students are educated in the least restrictive environment, the Commissioner's Regulations require that "a continuum of alternative placements" be available in all public schools to meet the needs of students that include instruction in regular classes and special classes, as well as supplemental services such as resource rooms, related services or itinerant instruction, in conjunction with regular class placements. (34 CFR 300.551; 8 NYCRR 200.6).

14. Prior to the legislation creating the Kiryas Joel Village School District (hereinafter also referred to as "KJVSD"), the handicapped children of the Village of Kiryas Joel (hereinafter also referred to as "KJ") were part of the Monroe-Woodbury Central School District and were entitled to receive special education services there. The Monroe-Woodbury Central School District offers a full continuum of services which were fully available to the children of the KJVSD prior to the legislation which created a school district exclusively for the children of KJ.

15. Upon information and belief, prior to the creation of the KJVSD which is coterminous with the Village of Kiryas Joel, the majority of parents of children with handicapping conditions residing in KJ chose not to avail themselves of special education and related services offered to their children by the Monroe-Woodbury Central School District because the Monroe-Woodbury Central School District would not provide these services either on the

premises of Satmar private schools located in KJ, or at a neutral site within the village. Upon information and belief, these parents kept their children out of the public schools to avoid the trauma they believed the children would suffer because of their cultural uniqueness.

16. As the Governor's Memorandum approving Assembly Bill 8747, indicates, the KJVSD was created by special act of the legislature "to resolve [this] longstanding conflict between the Monroe-Woodbury District and the village of Kiryas Joel, whose population are all members of the same religious sect...as a practical solution to what has been, so far, an intractable problem." (Exhibit J to Second Amended Complaint). Signed into law on July 24, 1989, Chapter 748 of the Laws of 1989, creating the KJVSD became effective July 1, 1990.

17. At the time the legislation was proposed, SED expressed its concerns regarding the ability of a school district intended only for children with handicapping conditions to comply with the legal mandate to provide special education to students in the least restrictive environment.

18. Because the State Education Department has concerns regarding the church-state issues involving a school district comprised solely of one religious sect, with a board of education consisting exclusively of members of that sect, my staff not only monitors special education at KJVSD, but also monitors the KJVSD to ensure that public funds are not expended to further religion.

19. Based on SED's monitoring visits, the Department has confirmed that the KJVSD is an insular, segregated educational setting in which both the religion and culture of the Satmarer are inextricably bound. For example, during a recent site visit to the KJVSD, a member of the monitoring team observed on the walls of a preschool classroom, photographs of preschool children lighting the candles of a menorah in their classroom with their preschool teacher.

20. Upon information and belief, prior to the creation of the KJVSD, the majority of Satmar Hasidic children residing in other school districts, such as the East Ramapo School District, and the present Monroe-Woodbury Central School District (exclusive of the newly formed KJVSD) were not enrolled in their public schools and did not take advantage of their services.

21. Currently the East Ramapo School District and the KJVSD have contracted for 17 Satmar children with handicapping conditions who reside in the East Ramapo School District to attend the KJVSD. Likewise, the Monroe-Woodbury Central School District has also contracted with the KJVSD for 3 of their Satmar children with handicapping conditions to attend the KJVSD. Upon information and belief, none of these districts have referred any children with handicapping conditions to the KJVSD who are not members of the Satmar Hasidic sect.

22. The Commissioner of Education has consistently held that the religious background of a student with handicapping conditions is not a relevant consideration

for determining a student's educational placement. (See e.g. Matter of a Handicapped Child, 21 Educ. Dept. Rep. 708, 711 (1982)). Given the fact that the two districts have only referred children with handicapping conditions who are members of the Satmar Hasidic sect to the KJVSD, it is clear that both the East Ramapo School District and the Monroe-Woodbury Central School District, have considered both religion and culture as a factor in their decision to refer these children to the KJVSD.

23. Consequently, classes at the KJVSD now consist exclusively of Satmar children with handicapping conditions from within the district, as well as nonresident Satmar children placed there by the school district where they live. Moreover, in KJVSD, only children with handicapping conditions are enrolled in the district while every non-handicapped child living in the district attends the sectarian school. As a result, there are no opportunities whatsoever for the handicapped children of the village to be placed in classes of the district with their non-handicapped peers.

24. In monitoring the East Ramapo School District, SED has requested the district to demonstrate why it has failed to provide, in-district programs for children who could benefit from interaction with their non-handicapped peers. Without adequate justification, removal from their home district is a violation of the children's right to a free appropriate education in the least restrictive environment.

25. I respectfully request that this Court accept as true and accurate the assertions which have been set forth herein.

/s/ Hannah Flegenheimer
Hannah Flegenheimer

Sworn to before me this
day of May 01, 1991.

Newell Middleton, Jr. /s/
Notary Public

Newell Middleton, Jr.
Notary Public, State of New York
No. 31-4897562
Qualified in New York County
Commission Expires June 1, 1991

[TITLE OMITTED IN PRINTING]

AFFIDAVIT OF DR. SARA FISCHER

STATE OF NEW YORK)
CITY OF NEW YORK) ss:

SARA FISCHER, being duly sworn, deposes and says:

1. I am the Chairperson of the Committee on Special Education for School District 7 in the Bronx, New York. In that position, I am responsible, among other things, for implementing federal, state and city regulations and procedures relevant to the assessment and placement of special education students. I submit this affidavit in my personal capacity and not in any official capacity.

2. As more fully set forth in my resume, attached as an Exhibit to this Affidavit, I have worked in the New York public school system for sixteen years and in the field of education for over twenty-five years. I have had special experience in the areas of bilingual-bicultural education and special education.

3. I received a Ph.D. in Education from Hofstra University in 1984, with a special focus on bilingual-bicultural education.

4. Due to my extensive experience and study of the fields of bilingual-bicultural education and their evaluation and assessment, I am considered an expert in those fields.

5. Based on my personal experience and my knowledge of the views of other experts, it is well established that educational services should take into account the primary language and background culture of the students. It is a fundamental tenet of sound educational theory that children must first learn to think and speak in their native language. If a child's native language is ignored, their learning skills will be adversely affected.

6. It is well recognized that bilingual education should not be divorced from bicultural education. For example, it is an important part of bilingual education to provide educational instruction relating to the traditions, customs, eating habits, and holidays of a child's native culture.

7. It is also well-recognized that the transmission of culture from one generation to the next is essential to the development of learning skills and habits in children. For example, a noted researcher in cognitive development and expert in the assessment and intervention of special education students, Dr. Reuven Feuerstein, has observed in his book The Dynamic Assessment of Retarded Performers at p. 39 (1979) that the "disruption" of this "intergenerational transmission" of culture causes a child to be "culturally deprived." Dr. Feuerstein concludes that "[s]uch deprivation

may strongly affect the adaptive capacities of the individual since he is devoid of the learning skills and habits that are produced by transmission processes." Id.

/s/ Sara Fischer
SARA FISCHER, Ph.D.

Subscribed and sworn to before _____
me this 21st day of June, 1991.

Ambrosio Rodriguez /s/
Notary Public

Rev. Ambrosio Rodriguez
Commissioner of Deeds
City of New York No 32201
Commission Expires August 1, 1991

13 9 9
Nos. 93-517, 93-527 and 93-539

FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1993

**BOARD OF EDUCATION OF THE KIRYAS JOEL
VILLAGE SCHOOL DISTRICT, BOARD OF EDUCATION
OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT
and ATTORNEY GENERAL OF THE STATE OF NEW YORK,**

Petitioners,

-against-

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE STATE OF NEW YORK**

**BRIEF FOR PETITIONER BOARD OF EDUCATION
OF THE MONROE-WOODBURY
CENTRAL SCHOOL DISTRICT**

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QUESTIONS PRESENTED

Chapter 748 of the 1989 Laws of the State of New York creates a Kiryas Joel Village School District with boundaries coterminous with the existing boundaries of the Incorporated Village of Kiryas Joel. Virtually all of the residents of such Incorporated Village are Orthodox Jews who are members of the Satmarer Hasidic community. Property within the Village is privately owned. There are no restrictive covenants prohibiting alienation of the parcels to non-Satmarer.

The trustees of the public school district created by the Chapter are popularly-elected by District residents, and they exercise the same duties and responsibilities as other public school trustees. The school established thereunder offers exclusively secular special education programs and services to handicapped students residing within the Village at a public site; it employs teachers and ancillary staff on a non-sectarian basis to instruct such students; and it follows a state-prescribed curriculum. It does not operate a traditional elementary or secondary school for non-handicapped district students, because such students choose to attend the parochial schools within the Incorporated Village in accordance with the parental preferences of the Satmarer. The questions presented follow:

1. Whether a state statute which creates a public school district with boundaries coterminous with an existing governmental unit in order to facilitate access to secular special education programs and services by disabled students sharing a common religious heritage has an impermissible primary

effect of advancing religion in violation of the First Amendment's Establishment Clause, where such state action was designed and intended to address the social, psychological and cultural needs of such students.

2. Whether the primary effect of a state statute creating a separate public school district in order to facilitate access to secular special education programs and services by handicapped students sharing a common religious heritage impermissibly advances or endorses that shared religious heritage in violation of the First Amendment's Establishment Clause where programs and services are provided directly to the students within the context of a secular public program at a public site utilizing the services of public employees.

3. Whether *Lemon v. Kurtzman*, 403 U.S. 602 (1971) should be overruled and replaced with a constitutional standard which authorizes permissive legislative accommodation to meet the secular educational needs of religious people.

LIST OF PARTIES

The parties to the proceeding below, as required by Supreme Court Rule 29.1, are as follows: petitioners Board of Education of the Monroe-Woodbury Central School District; Board of Education of the Kiryas Joel Village School District; and the Attorney General of the State of New York. Petitioner Board of Education of the Monroe-Woodbury Central School District, a public corporation, has no parent company, subsidiary or affiliate to list pursuant to Rule 29.1.

Respondents below were Louis Grumet and Albert
W. Hawk.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL
VILLAGE SCHOOL DISTRICT, BOARD OF
EDUCATION OF THE MONROE-WOODBURY
CENTRAL SCHOOL DISTRICT and ATTORNEY
GENERAL OF THE STATE OF NEW YORK,

Petitioners,

-against-

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS
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BRIEF FOR PETITIONER BOARD OF EDUCATION
OF THE MONROE-WOODBURY
CENTRAL SCHOOL DISTRICT

OPINIONS BELOW

The opinion of the Court of Appeals of the State
of New York is reported at 81 N.Y.2d 518, 601
N.Y.S.2d 61. The Opinion and Order of the Appellate

Division, Third Department is reported at 187 A.D.2d 16, 592 N.Y.S.2d 123; the Opinion of the Hon. Lawrence E. Kahn in Supreme Court, Albany County is reported at 151 Misc.2d 60, 579 N.Y.S.2d 1004.

JURISDICTION

This Court has jurisdiction to review the Opinion and Judgment of the Court of Appeals of the State of New York pursuant to the Title 28 U.S.C. § 1257, which authorizes review by certiorari of final judgments rendered by the highest court of a state, where the validity of a state statute is in question on the ground that it is repugnant to the Constitution of the United States. The Opinion and Judgment of the Court of Appeals of the State of New York which declares Chapter 748 of the 1989 Laws of the State of New York to be repugnant to the First Amendment of the Constitution of the United States was entered on July 6, 1993. This Court granted a writ of certiorari in Case Nos. 93-517, 93-527 and 93-539 on November 29, 1993.

CONSTITUTION PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides, insofar as pertinent, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;".

Chapter 748 of the 1989 Laws of the State of New York creates the Kiryas Joel Village School District;

establishes a mechanism for the popular election of a board of education and vests school trustees with the same powers and duties as trustees of other public school districts. The full text of the Chapter is reprinted at page 105a of the Appendix to Petitioner Board of Education of the Monroe-Woodbury Central School District's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

After this Court rendered its decisions in *Aguilar v. Felton*, 473 U.S. 402 (1985) and *Grand Rapids v. Ball*, 473 U.S. 373 (1985), petitioner Board of Education of the Monroe-Woodbury Central School District was compelled to reexamine the manner in which it had previously provided special education programs and related services to the Satmarer Hasidic handicapped students residing within the Incorporated Village of Kiryas Joel, which was then within the boundaries of the Monroe-Woodbury Central School District. Consistent with what it believed to be its obligations under federal and state law, more particularly the Education of the Handicapped Act (E.H.A.), the precursor to the Individuals With Disabilities Education Act (Title 20 U.S.C. § 1400, *et seq.*) and its state counterparts, Article 89 of the Education Law and Education Law, § 3602-c (commonly known as the "dual enrollment statute"), petitioner ceased to offer special education programs and services at an annex adjacent to and educationally identifiable with one of the parochial schools within the Village.

When the parties were unable to agree on an appropriate alternative method of furnishing such services, the Board of Education brought suit in Supreme Court, Orange County for judgment declaring that the State's "dual enrollment" statute compelled it to furnish special education and related services to non-public school students only within the regular classes of the public schools of the District and not otherwise. The Satmarer counterclaimed for a declaration that such services were required to be provided on the premises of the schools which their children customarily attended. In *Board of Education of the Monroe-Woodbury Central School District v. Wieder*, 72 N.Y.2d 174, 531 N.Y.S.2d 889 (1988), the New York State Court of Appeals, relying upon its construction of state law, rejected both positions, concluding instead that the District ". . . is neither compelled to make services available to the private school handicapped children only in the regular public school classes and programs, nor without authority to provide otherwise" (72 N.Y.2d at p. 187).

While the Court of Appeals' decision may have addressed the legal issues, it did not resolve the underlying dispute between the parties. The District Committee on Special Education, recognizing its authority under the decision of the Court of Appeals to continue to make programmatic decisions on an individual basis under applicable federal and state guidelines including the concept of "least restrictive environment", continued in most instances to recommend public school placements for the handicapped students residing within the Village of Kiryas Joel. The Satmarer, adhering to their prior position, declined to accept such services in the regular classes

of the public schools. They pointed to certain prior instances in which Satmarer students had accepted programs and services within the context of public placements but indicated that such placements had proved inappropriate because of such nonreligious factors as the impact upon the children of travelling out of the sheltered environment of the Village; the psychological harm of being thrust into a strange environment; the fact that their physical appearance and language difficulties immediately set them apart from other students; and the necessity for bilingual, bicultural programs specially adapted to meet their social, psychological and cultural needs.

Faced with the continued intractability in the positions of the parties and the consequent failure of the Satmarer to participate in public programs and services, the State Legislature took action in order to facilitate access by the handicapped students residing within the Village to those types of special education programs and services which are required by federal and state law to be made available to all handicapped students. The Legislature enacted Chapter 748 of the Laws of 1989 (Appendix¹ at 105a) which created the Kiryas Joel Village School District with boundaries coterminous with the existing Incorporated Village of Kiryas Joel. The legislation provided that the school district shall be governed by a board of trustees elected by the qualified voters of the Village, which board shall have the same powers and duties as trustees of union free school districts (Education Law, Article 35). The Sponsor's memo in support of the

¹ Page references in this Brief to the Appendix refer to the Appendix to Petitioner Board of Education of the Monroe-Woodbury Central School District's Petition for a Writ of Certiorari.

legislation (Appendix, at 106a-107a), the Governor's Memorandum approving the Chapter (Appendix, at 108a-109a), and the legislative history of the bill clearly indicate that the Kiryas Joel Village School District was created but for a single purpose, *i.e.*, to provide special education and related services to the handicapped students residing within the Village and not to operate a traditional elementary or secondary education program for resident non-handicapped students. Non-handicapped students continue to attend the parochial schools of the Village in accordance with the educational preference of the Satmarer for parochial education for their children.

The Kiryas Joel Village School constitutes a unique, wholly-secular presence within the Incorporated Village. While the Incorporated Village is composed almost entirely of members of the Satmarer Hasidic community, the School itself is staffed on a non-denominational basis, and some students tuitioned to the School by other public school districts are not Satmarer. Governance of the school district is separate and distinct from the religious leadership within the Village.

As is more fully reflected in the affidavit of Philip R. Paterno (Appendix, at 110a) and the affidavit of Steven M. Bernardo (Appendix, at 114a), the Village School is physically separate and apart from and is not proximate to or educationally identifiable with the religious schools within the community. It is secular in appearance, devoid of even the customary mezuzahs on the doorposts. The School is taught by an instructional staff certified by the Commissioner of Education of the State of New York, which is assisted by non-instructional staff selected in

accordance with applicable civil service rules and regulations. The School follows a secular academic calendar. While strict separation of male and female students is practiced within the surrounding community, boys and girls are instructed jointly at the School. Furthermore, the curriculum is secular and is not influenced or dictated by the sex of the student, as would be the practice in the religious schools within the Village. Female teachers instruct male students. This, too, would not occur in the religious schools. In addition, English is the primary language of instruction, although the School offers bilingual and bicultural secular special educational programs. This, too, should be contrasted with the surrounding community, in which Yiddish is the primary language of communication and instruction. Thus, the public school district offers programs and services which in many significant respects are at odds with the basic precepts of Satmarer Hasidim.

SUMMARY OF ARGUMENT

The statute enacted by the New York State Legislature which creates a secular Kiryas Joel Village School District with boundaries coterminous with the existing Incorporated Village of Kiryas Joel for the purpose of providing secular special education programs and services to the disabled Satmarer students residing within the Village is constitutional within the purview of the three-pronged test articulated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). It has valid secular legislative purpose in that it facilitates access by the disabled Satmarer students to bilingual, bicultural educational programs within a secular learning environment.

which is receptive to the particular sensitivities and vulnerabilities of such students.

The statute has a primary effect which does not advance religion, because the services provided are part of a general governmental program which distributes benefits neutrally to any child qualifying as disabled under the Individuals With Disabilities Education Act (Title 20 U.S.C. § 1400 *et seq.*) without regard to the sectarian-nonsectarian nature of the educational institution (*Zobrest v. Catalina Foothills School District*, ___ U.S. ___, 113 S.Ct. 2462 [1993]; *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 [1986]).

Furthermore, the services are furnished directly to the disabled students at a public site by public employees, thus avoiding the possibility of excessive entanglement between church and state through creation of a monitoring process designed to ensure that public employees will remain ideologically neutral (*Wolman v. Walter*, 433 U.S. 229 [1977]). Thus, the statute at issue is constitutional under *Lemon*, *supra*.

The Court below improperly focused upon the common religious heritage of the board members rather than upon the nature of the educational services or the manner in which such services would be provided to the disabled students attending the School. The Court below inferentially concluded that because all board members shared a common faith, they cannot be trusted to administer the public school system in a secular manner. Such reasoning was unequivocally rejected by this Court in *McDaniel v. Paty*, 435 U.S. 618 (1978), in which the Court held

that religious individuals could not constitutionally be compelled to choose between the exercise of civic office and their religious vocations.

This Court has previously recognized the existence of a "zone of permissible accommodation" at the intersection where the Establishment Clause meets the Free Exercise Clause (*County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, et al.*, 492 U.S. 573 [1989]; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 433 U.S. 327 [1987]; *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 [1970]). No party argues that the creation of the Kiryas Joel Village School District was required by the Free Exercise Clause. However, if this Court finds that the District serves a religious rather than a secular purpose for the Satmarer, it should nevertheless sustain the statute as a permissible legislative accommodation to alleviate a burden upon the Satmarers' Free Exercise right to avail themselves of the same types of secular educational programs and services for their disabled students which are generally made available to all handicapped students without regard to the type of schools which they attend, without subjecting such students to the inconsistent, worldly values of traditional public school systems (*Wisconsin v. Yoder*, 406 U.S. 205 [1972]).

The accommodation which the Legislature has fashioned does not advance the religious interests of the Satmarer. Secularism is antithetical to Hasidism, yet secularism is the *quid pro quo* for educational services furnished at the public site. The Kiryas Joel Village School District is the functional equivalent of the neutral site which this Court sustained in

Wolman v. Walter, 433 U.S. 229 (1977). While all the students of the facility may share a common faith (although all are not Satmarer Hasids), instruction is given at a public site through public employees in much the same manner as instruction is given throughout the public schools of the State of New York. Thus, the educational interests of the students, rather than their religious interests, are being advanced by the creation of the separate school district.

It should further be noted that no benefits flow directly to the religious schools or institutions within the Incorporated Village. No public moneys ever find their way into the coffers of the religious schools, nor are such schools relieved of any expenses which they would otherwise be compelled to bear (*Zobrest v. Catalina Foothills School District*, ___ U.S. ___, 113 S.Ct. 2462 [1993]; *Grand Rapids School District v. Ball*, 473 U.S. 373 [1985]). If the Kiryas Joel Village School District ceased to exist, petitioner Board of Education of the Monroe-Woodbury Central School District, from whose territory the District was created, would be compelled by federal and state law to resume responsibility for providing educational programs and services to the disabled Satmarer residing within the Village.

If this Court determines that the statute before the Court is inconsistent with *Lemon* and that it cannot be sustained as a permissible legislative accommodation to alleviate a burden upon the Satmarers' Free Exercise rights, this Court should revisit *Lemon*, *supra*, and overrule it to enable the state legislative process to fashion accommodations designed to meet

the secular needs of religious individuals without violating the constitutional rights of third parties.

ARGUMENT

POINT I.

CHAPTER 748 OF THE LAWS OF 1989 CREATING THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT IS CONSTITUTIONAL UNDER THE LEMON TEST

The creation of a secular public school district with boundaries coterminous with those of an existing governmental unit for the purpose of providing special education programs and services to disabled students residing within that governmental unit is clearly a valid secular legislative activity. Does it become otherwise merely because substantially all of the residents of that community share a common religious heritage and they have voluntarily chosen to live separate and apart from the broader heterogeneous community in accordance with their tradition of cultural and social isolation from outside influences? We respectfully submit that it does not.

The New York State Court of Appeals has held that the statute creating the Kiryas Joel Village School District is itself violative of the Establishment Clause of the First Amendment of the United States Constitution because the act will be regarded as effecting a symbolic union of church and state which is "sufficiently likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval of their

religious choices. Thus, the principal or primary effect of Chapter 748 of the Laws of 1989 is to advance religious beliefs" (81 N.Y.2d at 529). Utilizing the second prong of the *Lemon* test, *post*, the Court below struck down the statute, the effect of which was to "drap[e] a drastic, new disability over the shoulders of young pupils solely on account of the religious beliefs of their community" (*Grumet, et al. v. Board of Education of the Kiryas Joel Village School District, et al.*, 81 N.Y.2d 518, 557, dissenting opinion of Bellacosa, J.).

It is questionable whether the three-pronged test first articulated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), represents the current view of a majority of the Justices of this Court with respect to the analysis of potential Establishment Clause violations. The concurring opinion of Justice Scalia in *Lamb's Chapel, et al. v. Center Moriches U.F.S.D.*, ___ U.S. ___, 113 S.Ct. 2141, 2150 (1993), suggests that a majority of the Justices through their various opinions have "driven pencils through the creature's heart",² yet the majority opinion, at Footnote 7, notes

² Justice Scalia's concurrence collects the various opinions of the Justices which have criticized *Lemon* and have suggested that the Court revisit the test. He notes:

Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so. See *e.g.*, *Weisman, supra*, at 505 U.S. ___, 112 S.Ct. at 2678 (SCALIA, J., joined by, *inter alios*, THOMAS, J., dissenting); *Allegheny*

that "there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled. This case, like *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), presents no occasion to do so."

The *Lemon* test has been broadly criticized for its inflexibility, its unpredictability and for the lack of meaningful guidance which it provides both to governmental bodies and to the courts which seek to invoke its counsel. It is unclear whether *Lemon* continues to command the respect of a majority of the Justices of this Court for analysis of Establishment Clause controversies or whether this Court is now prepared to seek out an alternative analytic framework which provides both greater guidance to governmental entities wishing to conform their

County v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 655-657 (1989) (KENNEDY, J., concurring in judgment in part and dissenting in part); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 346-349 (1987) (O'CONNOR, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 107-113 (1985) (REHNQUIST, J., dissenting); *id.*, at 90-91 (WHITE, J., dissenting); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 400 (1985) (WHITE, J., dissenting); *New York v. Cathedral Academy*, 434 U.S. 125, 134-135 (1977) (WHITE, J., dissenting); *Roemer v. Maryland Bd. of Public Works*, 426 U.S. 736, 768 (1976) (WHITE, J., concurring in judgment); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 820 (1973) (WHITE, J., dissenting).

actions to the core principles inherent in the Establishment Clause and more consistency in judicial decisions.

Assuming *arguendo* that *Lemon, supra*, continues to be the preferred analytic framework for determining the permissibility of governmental action under the First Amendment's Establishment Clause, we respectfully submit that application of the various elements of the three-pronged test necessarily supports the constitutionality of the disputed statute. *Lemon, supra*, requires that a statute have a secular legislative purpose; that it have a principal or primary effect which neither advances nor inhibits religion; and it must not foster an excessive entanglement with religion. The various components of the test have been alternatively characterized as a "convenient distillation of principles" and "guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired" (*Meek v. Pittinger*, 421 U.S. 349, 358 [1975]) or "no more than helpful signposts" (*Hunt v. McNair*, 413 U.S. 734, 741 [1973]), depending upon the degree of deference accorded the test by the authoring Justice.

(A) The Statute has a Secular Legislative Purpose

The statute at issue establishes a separate school district for the Village of Kiryas Joel under the aegis of a popularly-elected board of education for the purpose of facilitating access to wholly-secular special educational programs and services by disabled students residing within the Village. The principal Assembly sponsor of the bill clearly regarded the

statute primarily as a vehicle for securing such access (Appendix, at 106a-107a), as did the Governor, who in his Approval Memorandum (Appendix, at 108a-109a), noted the history of protracted litigation between the Satmarer and the Monroe-Woodbury Board of Education and the intractable dilemma created by the intransigence of their respective positions with respect to the manner of provision of educational services to the disabled students residing within the Village.

The first prong of *Lemon* is not usually an issue in litigation involving legislation providing funding or services to students attending sectarian schools.³ valid secular legislative purpose is usually apparent from the legislative history of the statute. Thus, in *Wolman v. Walter*, 433 U.S. 229, 236 (1977), this Court found a legitimate secular legislative purpose in a statute which funded various ancillary services for non-public school students. The Court noted its satisfaction that the challenged statute reflected a "legitimate interest in protecting the health of its youth and providing a fertile educational environment for all the schoolchildren of the State". To the same effect, see *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), in which this Court similarly found a secular legislative purpose in certain programs designed to aid parochial school students, although the programs themselves were ultimately invalidated under the "primary effects" test.

³ It should be noted that the Kiryas Joel Village School District is a public school district in all respects and is not a sectarian school under any model of constitutional analysis.

In *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985), this Court noted that even if a statute were motivated in part by a religious purpose, this alone would not invalidate it under the first prong of *Lemon*. A statute may be invalidated thereunder only if it is "...entirely motivated by a purpose to advance religion". Subsequently, in *Bowen v. Kendrick, Secretary of Human Health and Services*, 487 U.S. 589 (1988), this Court reaffirmed that a statute may be invalidated under the "purpose" prong only if it is motivated *wholly* by an impermissible purpose. This Court associated itself with the reasoning of the District Court that even if it were assumed that the statute were motivated in part by an improper concern, the fact that it was also motivated in part by other entirely legitimate secular concerns would be sufficient to sustain its constitutionality. In Footnote 8 to the majority opinion, this Court noted: "We see no reason to conclude that the AFLA serves an impermissible religious purpose simply because some of the goals of the statute coincide with the beliefs of certain religious organizations" (487 U.S. at 604).

The statute at issue herein clearly has a secular legislative purpose, to wit, the facilitation of access to secular special education services by disabled students who would otherwise forbear from accepting such services (because of non-religious, cultural reasons) if offered only in the regular classes of the public schools of the Monroe-Woodbury Central School District. The prior decision by the New York Court of Appeals in *Board of Education of the Monroe-Woodbury Central School District v. Wieder*, 72 N.Y.2d 174, acknowledged the argument

advanced by the Satmarer that their children would be traumatized if they were compelled to leave the familiarity and security of the language, lifestyle and environment of the Village to receive educational services elsewhere. The statute accommodates the secular educational need of the Satmarer disabled students by facilitating access to bilingual, bicultural special educational services at a secular learning environment which is not perceived by them as inhospitable to their unique culture and traditions.

**(B) The Statute has a Primary Effect Which
Neither Advances nor Inhibits Religion**

While the "secular purpose" prong inquires into what government intended, the "primary effects" prong of *Lemon, supra*, looks to the actual effect of the disputed action. The New York Court of Appeals recognized that the "primary effect" prong went beyond mere funding of sectarian activities and extended to situations in which there existed "a close identification of the responsibilities of government and religion" (81 N.Y.2d at 527). It concluded that the statute creating the Kiryas Joel Village School District effected a symbolic union of church and state which was "likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval of their individual religious choices" (81 N.Y.2d at 529). Thus, the Court of Appeals held that the statute had an impermissible principal or primary effect to advance religious beliefs.

The "endorsement" elaboration of the second prong of *Lemon, supra*, has its genesis in the

concurrences of Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668 (1984) and in *Wallace v. Jaffree*, 472 U.S. 38 (1985). The concept finds full expression in Justice Brennan's opinion for the Court in *Grand Rapids School District v. Ball*, 473 U.S. 373, 389-390 (1985), in which the Court stated the principle as follows:

Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.

* * *

It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement and by the nonadherents as a disapproval, of their individual religious choices. The inquiry of this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years.

Thereafter, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, et al.*, 492 U.S. 573 (1989), Justice Blackmun reaffirmed the increasing importance of the concept of

endorsement as the core component of the second prong of *Lemon*. Recognizing that the term is not self-defining, the Court noted that government impermissibly endorses religion if it conveys a message that "religion or a particular religious belief is favored or preferred" (*Id.*, at 593). "Whether the key is 'endorsement', 'favoritism', or 'promotion', the central principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community. *Lynch v. Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring)." (*Id.*, at 593-594.)

Under Justice O'Connor's elaboration of *Lemon*, *supra*, an "objective observer" forms a perception of governmental action on the basis of his or her "familiarity with the text, legislative history, and implementation of the statute" (*Wallace, supra*, at 76). Such an observer would, of course, be "...acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption" (472 U.S. 38, 83).

We respectfully submit that the construct of the "objective observer" produces at best a variable and inconsistent analytic framework for identifying Establishment Clause violations. Perceptions oft define reality in a quixotic and unpredictable manner. Professor McConnell has noted that "[w]hether a particular governmental action appears to endorse or disapprove religion depends upon the presupposition

of the observer..."⁴ He suggests that "[w]hether an observer would 'perceive' an accommodation as 'endorsement of a particular religious belief' depends entirely upon the observer's view of the proper relationship of church and state"⁵ and argues that "[i]f Justice O'Connor's 'objective observer' standard is adopted by the courts, we would know nothing more than that judges will decide cases the way they think they should be decided".⁶ Similarly, Professor Paulsen suggests that the standard is "merely a cloaking device, obscuring intuitive judgments made from the individual judge's own personal perspective. There is nothing 'objective' (in the sense of some standard external to the judge's own intuitions) about the inquiry."⁷ Thus, the fiction merely serves but to confirm or legitimize by an after-the-fact labeling process, the pre-existing prejudices of the observer.

The New York Court of Appeals found that an impermissible message of endorsement was conveyed where a state created a public school district whose boundaries were coterminous with an existing governmental unit whose residents shared a common religious heritage. We submit that such an approach is constitutionally flawed. In our diverse

⁴ Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 148.

⁵ *Id.*

⁶ Michael W. McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1, 48.

⁷ Michael Stokes Paulsen, Lemon is Dead, 43 Case & Western Law Rev. 795, 816.

nation, there are numerous governmental units including towns, villages, local improvement districts and school districts where, by reason of chance, choice or freedom of association, substantially all of the residents may share a common religious heritage. This fact alone obviously does not disqualify such individuals from receipt of purely secular services offered to all citizens alike without regard to their religious affiliation, if any. No one would dare to suggest that the residents of the Village of Kiryas Joel should be denied public safety services including police and fire protection, public water supply, refuse removal or other traditional governmental services solely because of the religious composition of the underlying community, nor would anyone dispute the proposition that even religious individuals have legitimate secular needs which the state must meet under principles of equal protection of law. To accept the premise that the nature of the community, as opposed to the nature of the services to be provided, restricts the availability of governmental programs which are wholly secular and neutral and which are offered to a class defined without reference to religion is to place a unique burden or disability upon religious individuals who have voluntarily chosen to live together in furtherance of their traditions. Such action would impose a special burden upon their Free Exercise rights and would constitute overt hostility, rather than neutrality toward religion.

In *McDaniel v. Paty*, 435 U.S. 618 (1978), this Court struck as unconstitutional a Tennessee statute which disqualified ministers from serving as delegates to the state's constitutional convention on the ground that such statute penalized a minister's free exercise

of his constitutional right to seek public office without foregoing his religious vocation. The minister was forced to choose between his right to public office and the surrendering of his religious ministry, a condition the Court found to be unconstitutional. This Court noted:

However widely ~~that~~ view may have been held in the 18th century by many, including enlightened statesmen of that day, the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts. (At 629.)

The Kiryas Joel Village School District Board, as most New York State school boards, is elected by the residents of the community at a school district election held pursuant to the State's Education Law. The trustees may share a common religious heritage, but there is no evidence to suggest that they will not be faithful to their oaths of office to administer the affairs of the District in accordance with the Constitutions of the United States and the State of New York.⁸ To draw an inference that they may be

⁸ Article 13, § 1 of the Constitution of the State of New York prescribes the form of the constitutional oath of office to which all public officers, including school board members, must subscribe. The oath provides:

"I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully

faithless to their oaths based solely upon their shared faith does violence to our constitutional heritage. Are deeply religious individuals presumptively suspect as less capable of civic governance than non-religious individuals? Clearly, this cannot be so! Yet, the New York Court of Appeals in this instance perceived an identity based solely on the shared faith of the school members between the performance of the secular obligations of the board of education and the religious traditions of the Satmarers' shared faith, which in some indefinable manner rendered the school district itself an instrumentality in furtherance of the religious objectives of the Satmarer.

Justice Bellacosa, who authored the dissenting opinion in the Court below, stated that "...the establishment of a union free school district geographically identical to an incorporated municipality, in the context of the constitutional and statutory guarantees of public education, neutral religious rights and nondiscrimination provided by both Federal and State law, should not be stigmatized as aid to a particular denomination, simply because the inhabitants of that municipality are predominantly or even exclusively members of that denomination" (81 N.Y.2d 518, 557). We believe that Justice Bellacosa is correct in placing the constitutional focus upon the nature of the services to be provided, rather than upon the religion of the recipients, where the services themselves are completely secular and are of a type offered to students without regard to religion (Cf. *Zobrest v. Catalina Foothills School District*, U.S. ___, 113 S.Ct. 2462 [1993]; *Witters v. Washington*

discharge the duties of the office of,
according to the best of my ability".

Department of Services for the Blind, 474 U.S. 481 [1986]). Thus, in *Zobrest, supra*, this Court very recently sustained the constitutionality of the assignment of a sign-language interpreter under the Individuals With Disabilities Education Act (Title 20 U.S.C. § 1400 *et seq.*) to a deaf student who attended a sectarian school, where the service was "...part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped' under the I.D.E.A., without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends" (113 S.Ct. 2462, 2467).

The act creating the Kiryas Joel Village School District does not advance the religious interests of the disabled students within the Village but rather facilitates their access into secular programs offered without regard to religion which are designed to remediate identified educational disabilities. Thus, no message of endorsement for Satmarer theology, or, more particularly, for its separationist tenets, could be drawn by the "objective observer" from the manner in which programs and services are actually offered to students attending the school.

The objective observer would of course be familiar with the protracted controversy, including years of litigation between the Board of Education of the Monroe-Woodbury Central School District and the parents of disabled students residing within the Village with respect to the manner of provision of programs and services for the disabled students residing within the Village. The observer would note that the Legislature took pains to craft a statute which facilitated access yet imposed as the *quid pro quo* the requirement that such programs and services be

furnished in a wholly-secular manner by public employees at a public site. Secularism is antithetical to Hasidism, yet secularism predominates within the Kiryas Joel Village School. Employees are hired in accordance with applicable federal and state law, rules and regulations, including those specifically prohibiting employment discrimination on the basis of sex, race, color, creed, religion, national origin and disability. English is the language of instruction within the School, in sharp contrast to Yiddish, which is the medium of communication within the Village itself. Male and female students are grouped together for instructional purposes, a practice which does not occur within the religious schools in the community. Instructional materials are not based upon the sex of the student being instructed, again a practice inconsistent with the parochial schools.

The physical appearance of the building is secular, including the very significant absence of mezuzahs on the doorposts. The school follows a secular academic calendar. The religious prohibition against female employees exercising supervisory authority over male employees is not followed within the School. Employees dress in a secular manner.

The objective observer could not fail to take note of the antiseptic, secular environment within the public school and contrast it with the rich traditions within the surrounding community and its sectarian schools. He or she would observe that the public school district has followed the Individuals With Disabilities Education Act and has developed an individualized education program for each child within the School, which identifies the specific programs and services which are necessary and

appropriate to remediate that child's disabilities. Thus, the instruction being offered is in each instance entirely secular and is tailored to remediate specific disabilities.

Additionally, an objective observer who was familiar with the legislative history of the Act would also be aware of the fact that the bill which ultimately became the Chapter was enacted by overwhelming majorities in both Houses of the State Legislature by legislators who were not Hasidic and that the bill was approved by a Governor who was not Hasidic. The observer would be aware of the fact that the County Executive of the County in which the school district is located urged executive approval for the bill, as did the Board of Education of the Monroe-Woodbury Central School District, from whose territory the school district was created. Thus, the observer would note the widespread support and approval enjoyed within the non-Satmarer community for the legislative solution toward what had previously proven to be an intractable dispute where access was conditioned upon principles of secularism. Markedly, the observer would not find any factual support for the proposition that non-adherents directly affected by the law regarded the statute as a disapproval of their own religious choices. The non-Satmarer institutions most directly affected by the law, the County and the Monroe-Woodbury Central School District, each specifically supported the bill which was enacted into law.

This Court's recent holdings in the "access" cases instruct that where pursuant to a statute or practice a governmental body provides access to its property on a non-discriminatory basis, the mere neutral act of

facilitating access will not be perceived as an endorsement of the resultant activities. In *Widmar v. Vincent*, 454 U.S. 263 (1981) and thereafter in *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), this Court sustained the constitutionality of governmental actions which facilitated equal access to public facilities for religious speech-related activities. In *Widmar, supra*, this Court held that where a university had customarily made its facilities available for general use by student organizations, it could not thereafter selectively exclude a prospective user on the basis of the proposed religious content of its contemplated message. Similarly, in *Mergens, supra*, this Court, applying the federal Equal Access Statute (98 Stat. 1302, 20 U.S.C. §§ 4071-4074), extended *Widmar* to require equal access for religious speech activities by secondary students, where the school had opted to make its property available for non-curriculum related activities. In *Mergens*, this Court noted that high school students would not be likely to "confuse an equal access policy with state sponsorship of religion" (496 U.S. 226 at 250).

This Court's very recent decision in *Lamb's Chapel v. Center Moriches U.F.S.D.*, ___ U.S. ___, 113 S.Ct. 2141 (1993), further reflects the proposition that the neutral act of facilitating access does not necessarily equate to an endorsement of the resultant activities.⁹ In *Lamb's Chapel, supra*, this Court found

⁹ Again, it should be noted that the Kiryas Joel Village School District is a public school in all respects. Thus, the access cases are cited merely for the concept that facilitation of access even in the more-extreme case of religious speech on a neutral basis should not be perceived by an objective

"no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or the Church would have been no more than incidental" (*Id.*, at 2148).

All disabled students are entitled by federal and state law to access to programs and services appropriate to meet their special education needs (Title 20 U.S.C. § 1400 *et seq.*; Education Law, Article 89). The Individuals With Disabilities Education Act (I.D.E.A.) specifically mandates inclusion of private (including parochial) school students within the programs and services required by the Act (Title 20 U.S.C. § 1413[a][4][A]; Title 34 C.F.R. §§ 300.341[b]; 300.349; 300.400–300.452). In *Zobrest, supra*, this Court rejected the argument that a statute which facilitated access by a parochial school student to the services of an I.D.E.A.-funded sign language interpreter on the premises of a parochial school advanced the religion of such student in violation of the First Amendment. This Court in *Zobrest, supra*, held that the federal statute created no federal incentive for any parent to choose a sectarian school, nor did any public moneys find their way into the coffers of the religious institution. Thus, the only benefit which the school received was indirect and attenuated. In addition, the religious school was not relieved of any costs it would otherwise have been compelled to bear in educating its students as a result of implementation by the public school of its mandate under the I.D.E.A. to include students without regard to the "religious-non-religious" nature of the schools

observer as an endorsement of the resultant activities.

which such children attended in programs and services under the Act. That holding is directly relevant hereto.

The New York State Legislature has enacted a statute creating a public school district as the vehicle for offering secular education services to all residents of a defined, pre-existing governmental entity, without regard to the religious or non-religious preferences of the students or their parents. It strains credibility to suggest that the provision of entirely-secular educational services at a public site by public employees to disabled children sharing a common religious heritage has the primary effect of advancing the *religious* precepts of such students solely because of their shared religious heritage, where the services themselves are secular in nature. It should be emphasized that the Kiryas Joel Village School District, unlike the parochial school before the Court in *Zobrest, supra*, is a public school in all respects. Although all students in attendance at the School may share a common religious heritage (although in fact some tuition students sent to the District's unique bilingual and bicultural special education programs by other school districts are not Satmarer Hasids), this Court has repeatedly held that this factor in and of itself will not serve to invalidate a program which furnishes secular educational services through public employees at a public site (*Wolman v. Walter*, 433 U.S. 229 [1977]).

The creation of the Kiryas Joel Village School District does not result in the diversion of any public funds to the parochial schools within the Village or to the religious institutions therein, nor have the parochial schools in the underlying community been

relieved of any significant burden they would otherwise have been compelled to bear (Cf. *Grand Rapids School District v. Ball*, 473 U.S. 373 [1985]). If the Kiryas Joel Village School District ceased to exist, the burden for providing programs and services for the disabled students residing within the Village would devolve by federal and state law upon the Board of Education of the Monroe-Woodbury Central School District, from whose territory the school district was created. The Monroe-Woodbury Central School District would thereafter be required to meet such needs of such children in accordance with the mandate of the I.D.E.A. and the State's counterpart legislation. Even were there no Village School District, the parochial schools within the Village would still not be compelled to bear the cost of furnishing a secular special education program to resident disabled students. In that instance, the underlying legal responsibility for providing the free appropriate public education required by law would revert to the public school district of residence, even in instances where the parent opts for a parochial school placement for his or her own child. Thus, the parochial schools receive no direct benefit or indirect subsidy from the statute creating the Kiryas Joel Village School District, as might occur where a public school official district takes over a "substantial portion of the responsibility of teaching secular subjects" (Cf. *Grand Rapids, supra*, at 397). In view of the foregoing, it is clear that the Act does not advance the religious interests of the Satmarer and does not directly benefit the religious institutions within the community, except in an indirect or attenuated manner. To the contrary, it addresses a legitimate secular need of the disabled students through appropriate secular means, and thus the Act has a permissible

secular primary effect which is consistent with the second prong of the *Lemon* test.

(C) The Statute does not Foster an Excessive Entanglement between Church and State

The statute creating the Kiryas Joel Village School District does not foster an excessive entanglement between church and state, because the resulting public school district offers programs and services to disabled students at a public site through public employees. Thus, there is no need to institute "...a comprehensive, discriminatory, and continuing state surveillance...to ensure that [the statutory] restrictions are obeyed and the First Amendment [is] otherwise respected" (*Lemon v. Kurtzman*, 403 U.S. 602, 619 [1971]).

The public nature of the resulting facility in the instant case readily distinguishes the activities from those previously invalidated by this Court in *Meek v. Pittinger*, 421 U.S. 349 (1979) and in *Aguilar v. Felton*, 473 U.S. 402 (1985). In those cases, this Court found that the assignment of public employees to provide academic instruction within the pervasive sectarian environment of the parochial schools created an intolerable risk that the public employees would overtly or subtly conform their instruction to the religious environment of the facility or might otherwise intertwine religious doctrine with secular instruction, in violation of their constitutional obligation to remain ideologically neutral. Thus, pervasive monitoring by public employees would be required to guard "against the infiltration of religious thought" (*Aguilar, supra*, at 413). Ironically, the "very

supervision of the aid to ensure that it does not further religion renders the statute invalid" (*Bowen v. Kendrick*, 487 U.W. 589, 615 [1988]).

In *Wolman v. Walter*, 433 U.S. 229 (1977), this Court explained that the danger inherent in the assignment of public employees to give academic instruction in church-related schools arose "not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course" (*Id.*, at 247). In *Wolman*, *supra*, however, this Court sustained the constitutionality of provision of certain therapeutic, guidance and remedial services to parochial school students in public centers or in mobile units off the non-public premises. This Court held that so long as the mobile instructional units were not physically or educationally identifiable with the functions of the non-public school, the program was constitutional despite the fact that on occasion such units might serve only the needs of sectarian school students. The Court stated:

The fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the Court in *Meek*. The influence on a therapist's behavior that is exerted by the fact that he serves a sectarian pupil is qualitatively different from the influence of the pervasive atmosphere of a religious institution. The dangers perceived in *Meek* arose from the nature of the institution, not from the nature of the pupils. (433 U.S. at 247, 248.)

This Court then addressed the issue of whether supervision by public school officials of public employees assigned to mobile units created a potential for impermissible excessive entanglement. The Court rejected the contention, saying;

Neither will there be any excessive entanglement arising from supervision of public employees to ensure that they maintain a neutral stance. It can hardly be said that supervision of public employees performing public functions on public property creates an excessive entanglement between church and state. (433 U.S. at 248.)

Thereafter, in *Bowen v. Kendrick*, 487 U.S. 589 (1988), this Court refused to invalidate a statute which on its face authorized federal grants both to non-sectarian and to religiously-affiliated organizations for services and research in the area of premarital adolescent sexual relations and pregnancy. This Court held that while it was foreseeable that some proportion of the recipients of government aid would be religiously-affiliated, only a small portion of these could be identified as "pervasively sectarian". The Court distinguished between grants-in-aid to religious institutions which were "pervasively sectarian", as in the case of parochial elementary and secondary schools, and other grants to religious organizations which were not "pervasively sectarian", holding that the latter would require less intrusive monitoring and thereby cause the Government to intrude to a lesser degree in the day-to-day operation of the religiously-affiliated AFLA grantees. Such degree of grant monitoring, the Court noted,

"does not amount to 'excessive entanglement', at least in the context of a statute authorizing grants to religiously affiliated organizations that are not necessarily 'pervasively sectarian'" (*Id.*, at 617).

The Court below made no finding with respect to the applicability of the third prong of the *Lemon* test, but, rather, based its holding exclusively on the finding that the statute violated the "primary effects" test. However, should this Court choose to utilize the *Lemon* test as the benchmark for determining the constitutionality of the statute at issue, clearly, the act creating the Kiryas Joel Village School District has not and can not foster an excess of entanglement between church and state, because, as this Court has clearly and unequivocally noted, there can be no excessive entanglement arising from the supervision of public employees at a public site (*Wolman, supra*).

POINT II.

THE STATUTE REPRESENTS A VALID PERMISSIVE ACCOMMODATION UNDER THE FIRST AMENDMENT

Professor Tribe argues for the existence of a "zone of permissible accommodation"¹⁰ at the intersection where the two religion clauses meet. He suggests that at such point, "the free exercise clause dominates the intersection, permitting the accommodation of religious interests".¹¹ The decisions of

¹⁰ Tribe, *American Constitutional Law* § 14-4, at 1169 (2nd Ed.).

¹¹ *Id.*

this Court support the viability of the concept of permissive accommodation and the appropriateness of the application of the doctrine to the statute creating the Kiryas Joel Village School District.

In *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-145 (1987), this Court has frankly acknowledged that "government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause". Similarly, Justice Brennan in his dissenting opinion in *Marsh v. Chambers*, 463 U.S. 783, 812 (1983) suggested that "even when a government is not compelled to by the Free Exercise Clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion". To the same effect, see *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987), wherein the Court noted: "There is ample room under that [Establishment] Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

In *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 673 (1970), this Court acknowledged that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself". Furthermore, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, et al.*, 492 U.S. 573, 613 (1989) at Footnote 59, this Court noted that the "scope of accommodations permissible under the Establishment Clause is larger

than the scope of accommodations mandated by the Free Exercise Clause".

Professor McConnell suggests that government may be in a better position than the courts to "...evaluate the strength of its own interest in governing without religious exemptions";¹² thus "[w]here the government determines that it can make an exception without unacceptable damage to its policies, there is no reason for a court to second-guess that conclusion, unless the constitutional rights of other persons are adversely affected. Such a determination advances the pluralistic goals of the First Amendment".¹³ He argues that the government may enact laws or policies which "have the purpose and effect of removing a burden on, or facilitating the exercise of, a person's or an institution's religion"¹⁴ and suggests the distinction between legitimate accommodation and impermissible "Establishment" is that "the former merely removes obstacles to the exercise of a religious conviction adopted for reasons independent of the government's action, while the latter creates an incentive or inducement (in the strong form, a compulsion) to adopt the practice or conviction".¹⁵

¹² McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1, 31.

¹³ *Id.*

¹⁴ McConnell, Accommodation of Religion: an Update and a Response to the Critics, 60 Geo. Wash. L. Rev. 685, 686 (1992).

¹⁵ *Id.*

Professor Tribe notes that "[l]eaving room for legislatures to draft religious accommodations recognizes that they may be in a better position than courts to decide when the advantages of strict neutrality are overstated".¹⁶

The Court below inferentially held that because in its view religion permeated and infused all aspects of daily life within the Village, *ipse dixit* the statute creating the Kiryas Joel Village School District necessarily advanced the religious interests of the Satmarer rather than merely accommodated their request for secular special educational services at the functional equivalent of the neutral site authorized by this Court in *Wolman v. Walter*, 433 U.S. 229 (1977). While it is clear from the Record below that the statute channels secular services through a popularly-elected board of education directly to disabled students at a statutory secular location through the use of public employees, the Court of Appeals nevertheless regarded this permissible legislative accommodation as a submission to the dictates of a religious community as to where secular services should be provided. Similarly, the Court below inappropriately regarded the legislative decision to accommodate, which was well within its permissive authority, as "yield[ing] to the demands of a religious community whose separationist tenets create a tension between the needs of its handicapped children and the need to adhere to certain religious practices" (81 N.Y.2d at 531).

It should be noted that the prior decision of the Court of Appeals in *Board of Education of the*

¹⁶ Tribe, American Constitutional Law, § 14-7, at p. 1195 (2nd Ed.).

Monroe-Woodbury Central School District v. Wieder, et al., 72 N.Y.2d 177, which decision served, at least in part, as the catalyst for the legislation at issue, acknowledged the argument of the Satmarer that "they should be exempted from public school placements only for *nonreligious* reasons—most particularly because of the emotional impact on the children of travelling out of Kiryas Joel" (72 N.Y.2d at 189) (emphasis in original). Similarly, the legislative findings which prompted enactment of the statute also stressed the secular nature of the accommodation to be effectuated by the statute by conditioning provision of secular special educational programs and services within the context of a public school placement by public employees at a public site. If the accommodation also met the religious preferences of the Satmarer, this is not a legal basis for invalidating it (*Bowen v. Kendrick*, 487 U.S. 589 [1988]).

Even if this Court concludes that the primary effect of the statute is to accommodate religious rather than secular (or some hybrid mixture of the two) interests of the disabled Satmarer students, the Court should nevertheless sustain the legislative judgment as to the necessity for and appropriateness of such accommodation as the alleviation of a burden upon the Free Exercise rights of the Satmarer. No party to the within litigation claims that the accommodation at issue, *i.e.*, the creation of the Kiryas Joel Village School District, was required by the First Amendment's Free Exercise Clause. Rather, the issue before this Court is whether the creation of the District *per se* constitutes a violation of the Establishment Clause.

Justice Bellacosa, who authored the dissenting opinion below, put the issue in proper perspective. He stated:

The unmistakable reality of this case is that the stricken legislation tried to create a secular public school for pupils with special education needs. The Majority concludes that the effort fails. Yet, the new public school district offers programs and services at odds with many basic precepts of Satmarer Hasidism, yet secularism is the *quid pro quo* imposed by the State for these Village residents to avail themselves in this way of State-regulated special educational services for their handicapped youngsters. Though the Legislature bent over backwards, as a last resort, to address the legitimate special education needs of the Satmarer students, it did not bend to the theology of their families or community (see generally, *Tribe, American Constitutional Law* § 14-7, at 1195 [2d ed]).

If, despite the strong legislative history to the contrary, this Court chooses to regard the Satmarer's traditional preference for separate education for their children apart from social and cultural forces within the broader heterogeneous society as being inherently religious in nature, then the analogy to the accommodation granted by the Legislature to exemption from compulsory attendance requirements which this Court recognized for the Amish in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) becomes even more striking. In *Yoder, supra*, this Court recognized the centrality of a "life in a church

community separate and apart from the world and worldly influences" (406 U.S. at 210) and the necessity for maintaining cultural boundaries and distance from outside influence as essential to the continued existence and physical survival of the Amish community. As a consequence thereof, it relieved the Amish from the burden of complying with the State's compulsory attendance rules, where compliance would subject their students to the worldly, modern influences of public school systems whose values are by their very nature inconsistent with the insular, traditional values of the Amish.

The parallel between *Yoder, supra*, and this case is compelling. In each, an insular religious group whose traditions and practices may be regarded as idiosyncratic by the broader community seeks protection through accommodation from the worldly influences which it perceives will subvert the values it holds to be traditional and central to its faith. The New York State Legislature in this case has recognized the appropriateness of granting the accommodation because of the special vulnerability of the disabled Satmarer students to an outside world from which their culture, religion, language and manner of dress immediately sets them apart, but it has conditioned the accommodation upon complete secularization of services within a non-sectarian learning environment. Absent such accommodation, the history of the protracted litigation between the Monroe-Woodbury Central School District and the Satmarer demonstrates that few, if any, Satmarer would actually accept programs and services for their children if offered in the regular classes of the public schools of the Monroe-Woodbury Central School District. Thus, the Legislature could take note that

the practical effect of offering programs and services within the context of a Monroe-Woodbury placement is *de facto* to place a burden upon the sect's Free Exercise right in which the observant Satmarer is compelled to choose between acceptance of services in a context which is unacceptable to his or her tradition and lifestyle or to forbear from receipt of the special educational services which his or her child desperately requires and is otherwise entitled to receive. "That accommodation in these circumstances, on a facial attack and analysis, is supportable as a permissible deference to the historical and evolved predominance of Free Exercise protection in First Amendment constitutional adjudication" (dissenting opinion of Justice Bellacosa, 81 N.Y.2d at 559).

The Court below failed to distinguish between an accommodation which takes religion into account and an accommodation enacted *for the purpose of advancing religion*. In *Neuchterlein*, Note, *The Free Exercise Boundaries of Permissible Accommodation under the Establishment Clause*, 99 Yale L. J. 1127 (1990), the author suggests that courts must distinguish between those laws which take religion into account and those which were enacted for the purpose of advancing religion. He suggests that a law accommodating religious belief is not the same as one which purposefully advances it. Illustrative of the former are laws allowing sacramental use of wine during Prohibition and sacramental use of peyote by certain Native Americans and laws authorizing a "moment-of-silence", where Legislatures have acknowledged a religious belief held by some citizens but have not purposefully advanced it. The author characterizes this phenomenon, the accommodation of the religious beliefs of others as a

respectful thing to do rather than for the purpose of advancing such beliefs, as a form of "secular respect". He notes that "[a]ccommodating these people simply reflects the government's secular respect for their right to choose their way of life". We believe that the distinction is relevant hereto.

Justice Souter in his concurring opinion in *Lee v. Weisman*, 505 U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), speaks eloquently with respect to the necessity for accommodation as an expression of secular "respect for, but not endorsement of, the fundamental values of others". He notes:

That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account. The State may "accommodate" the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings. See, e.g., *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); see also *Sherbert v. Verner*, 374 U.S. 398 (1963). Contrary to the views of some, such accommodation does not necessarily signify an official endorsement of religious observance over disbelief.

In everyday life, we routinely accommodate religious beliefs that we do not share. A Christian inviting an Orthodox Jew to lunch might take pains to choose a kosher restaurant; an atheist in a hurry might yield the right of way to an Amish man steering a horse-drawn carriage. In so acting, we express respect for, but

not endorsement of, the fundamental values of others. We act without expressing a position on the theological merit of those values or of religious belief in general, and no one perceives us to have taken such a position.

The government may act likewise. Most religions encourage devotional practices that are at once crucial to the lives of believers and idiosyncratic in the eyes of nonadherents. By definition, secular rules of general application are drawn from the non-adherent's vantage and, consequently, fail to take such practices into account. Yet when enforcement of such rules cuts across religious sensibilities, as it often does, it puts those affected to the choice of taking sides between God and government. In such circumstances, accommodating religion reveals nothing beyond a recognition that general rules can unnecessarily offend the religious conscience when they offend the conscience of secular society not at all. (At 112 S.Ct. 2649, 2676-77.)

Chapter 748 of the Laws of 1989 accommodates a purely secular interest of the Satmarer by facilitating access by their disabled students to bilingual, bicultural special education programs. It relieves them of a burden upon their Free Exercise rights by enabling them to accept programs and services within the context of the statutory equivalent of the "neutral site" in a secular learning environment designed to be more receptive to and protective of the special and particular psychological vulnerabilities of the disabled Satmarer students.

An otherwise valid accommodation should not be set aside because it meets the religious preferences of a particular religious organization (*Bowen v. Kendrick*, 487 U.S. 589 [1988]). To the same effect, see *Clayton v. Place*, 884 F.2d 376 (8th Cir., 1989) *cert. den.* 494 U.S. 1081 (1990), in which the Court of Appeals for the Eighth Circuit specifically held that the mere fact that a governmental body took an action which coincided with the principles or desires of a particular religious group did not "transform the action into an impermissible establishment of religion" (at 380). To the contrary, invalidation of an otherwise valid secular act merely because it coincides with the religious objectives of a particular religious group would constitute overt hostility to religious precepts rather than neutrality and would thus violate the Free Exercise clause".

This Court should not lightly set aside the political judgment of the New York State Legislature which has determined that the State's more generalized interest in fostering heterogeneous student populations was not impaired by the granting of an accommodation to the Satmarer to facilitate access by their disabled students to special education programs and services in a separate but secular public educational setting. Further, it should not question the Legislature's assessment that the weight of such generalized policy was not significant enough to overcome the appropriateness of the granting of the accommodation at issue herein. The State's own political processes should properly evaluate the strength of a state's interest and the appropriateness of granting accommodations therefrom within the permissive zone of accommodation between the

religion clauses, where the constitutional rights of third parties are not affected thereby.

POINT III.

THE LEMON TEST SHOULD BE REVISITED IF SUCH ACTION IS NECESSARY TO SUSTAIN THE CONSTITUTIONALITY OF THE STATUTE

We respectfully submit that the statute creating the Kiryas Joel Village School District has a secular legislative purpose, does not have a primary or principal effect which advances or impedes religion and does not foster an excessive governmental entanglement with religion as those terms have been defined in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and its progeny. Furthermore, if this Court regards the statute as accommodating the religious (as opposed to secular educational) needs of the disabled Satmarer students, the statute should nevertheless be sustained as a valid permissive alleviation of a burden upon their Free Exercise rights by enabling the Satmarer to accept such services in a manner consistent with their tradition of cultural isolation and maintenance of distance from worldly influences.

If this Court determines that the statute at issue is inconsistent with the precepts of *Lemon, supra*, and is not a permissive legislative accommodation thereunder, then we respectfully urge the Court to reconsider *Lemon* and to replace it with an analytic framework which is more amenable to accommodation of the secular needs of religious individuals. This Court in *Lee v. Weisman*, 505 U.S. ___, 112 S.Ct. 2649 (1992), very recently declined to adopt various

alternatives to *Lemon, supra*, predicated upon a "textualist" or "non-preferentialist" model or to adopt a test which would have identified coercion or coercive practices as the core element of an Establishment Clause violation. None of these alternatives appears to have garnered the clear support of a majority of the Justices of this Court, and the recent change in the composition of the Court will no doubt have further implications with respect to the continued viability of *Lemon*.

A specific vehicle can bear only so much weight. Perhaps the basic practical difficulty with *Lemon* is that the courts have attempted to apply the three-pronged test to such disparate activities as display of religious symbols; funding of educational programs and services within sectarian schools; prayer and prayer-related activities; speech-related religious access to public property; and the viability of permissive accommodations. This Court should revisit the issue whether any one specific test can fairly assess the constitutionality of such a broad range of activities or whether a series of more program or activity-specific tests should be formulated in lieu thereof to analyze governmental action against the core principles inherent in the Establishment Clause. The *Lemon* test has become the proverbial Procrustean bed upon which facts are laid without adequate differentiation as to individual differences. The results are sometimes harsh and often unpredictable.

Professor Stephen L. Carter in *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993) suggests that this Court should be more receptive to accommodations which

alleviate burdens on religious groups' Free Exercise rights. He notes:

It is difficult, however, to see how the law can protect religious freedom in the welfare state if it does not offer exemptions and special protections for religious devotion. To offer religions the chance to win exemptions from laws that others must obey obviously carves out a special niche for religion, but that is hardly objectionable; carving out a special place for religion is the minimum it might be said that the Free Exercise Clause does. (At 133-134.)

Professor Carter urges the reinstatement of the "compelling state interest test" as the appropriate analytic framework for evaluating claims for exemption (or accommodation) from burdens upon religious devotion. Professor Carter suggests:

Translating this principle into law, one would say that the central acts of faith of a religious community—the aspects that do the most to produce shared meaning within the corporate body of worship—are entitled to the highest solicitude by the courts, and, therefore, when infringing on those central acts, the state must offer a very convincing reason. As the acts of faith that the state seeks to regulate or forbid become less central, the state's burden of justification grows less. (At 143.)

Indeed, Congress itself has mandated a similar statutory approach to the restoration of religious exemptions through the enactment of the Religious Freedom Restoration Act of 1993, Public Law 103-141 (107 Stat. 1488 [1993]), which statute has as its primary

purpose to overrule this Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), and to restore the "compelling state interest" test in evaluating legitimacy of exemption of religious activities from laws of general application.¹⁷

In *Smith, supra*, this Court significantly altered the manner in which courts must now evaluate free exercise claims and severely limited the right of individuals to secure religiously-based exemptions from statutes of general applicability. The decision in *Employment Division, supra*, held in essence that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)" (*Id.* at 494 U.S. 872, 879). This Court, however, specifically retained the prior standard articulated in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and in *Wisconsin v. Yoder, supra*, for what it characterized as "hybrid" situations, as where a free exercise claim

¹⁷ The Act, in pertinent part, provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)", which subsection provides that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest" (Bill §§ 3[a] and [b]).

is connected with a communicative activity or parental right, such as a right to raise one's children in accordance with his or her religious beliefs. Thus, the constitutionality of the permissive legislative accommodation at issue herein would—notwithstanding *Smith, supra*, or the restorative provisions of Public Law 103-141—continue to be determined by reference to the “compelling state interest” test articulated in *Yoder, supra*.

If *Lemon* is not susceptible to a construction which sustains the constitutionality of Chapter 748 of the Laws of 1989, then we respectfully suggest that this Court should not hesitate to overrule it and to replace it with general principles recognizing the constitutionality of permissive, noncoercive legislative accommodation of the purely secular interests of religious individuals. This case, involving the creation of an entirely secular public school district to meet the identified educational needs of disabled Satmarer students, provides the ideal vehicle to revisit *Lemon* and, if necessary, to overrule it.

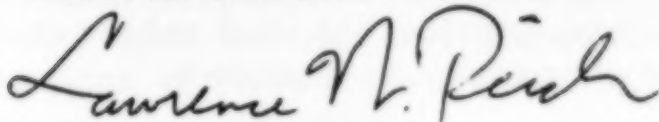
CONCLUSION

For the foregoing reasons, the appeal should be granted, and an order of remittitur should be entered directing the Court of Appeals of the State of New York to enter judgment declaring the facial constitutionality of Chapter 748 of the Laws of 1989 of the State of New York.

Dated: Northport, New York
January 19, 1994

Respectfully submitted,

INGERMAN, SMITH, GREENBERG,
GROSS, RICHMOND, HEIDELBERGER,
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No. 93-517, 527, 539

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In The
Supreme Court of the United States
October Term, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL
VILLAGE SCHOOL DISTRICT,

Petitioner,

against

LOUIS GRUMET AND ALBERT W. HAWK,

Respondents.

[Caption Continued on Inside Cover]

On Writ Of Certiorari To The
New York State Court Of Appeals

BRIEF FOR RESPONDENTS

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BOARD OF EDUCATION OF THE MONROE-
WOODBURY CENTRAL SCHOOL DISTRICT,

Petitioner,

against

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

THE ATTORNEY GENERAL OF THE
STATE OF NEW YORK,

Petitioner,

against

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

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QUESTION PRESENTED

Whether the New York State Court of Appeals correctly held that Chapter 748 of the Laws of 1989 entitled "An Act to establish a separate school district in and for the Village of Kiryas Joel, Orange County," violates the Establishment Clause of the United States Constitution because it confers upon an exclusive religious community the extraordinary benefit of a separate public school district to enable that community to receive already available public education services in an environment which conforms with the community's religious beliefs and traditions.

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BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF THE CASE

A. About the Satmar Hasidim.

The Satmar Hasidim who comprise the population of the Village of Kiryas Joel located in Orange County, New York ("the Village"), are members of an Orthodox Jewish sect representing one of the dynastic rabbinical courts which rose in the 18th century in Eastern and Central Europe. The Satmar sect is the most conservative and traditional of the Hasidic courts. According to scholars well-versed in Hasidic religious precepts, Satmar Hasidim believe in a literal interpretation of Scripture and the teachings of the Torah. The Talmud (the book of Jewish law and tradition) serves to guide every aspect of their life from dress to diet. Central to Satmar beliefs and way of life is the drawing of cultural boundaries between the Satmar community and the rest of society. These boundaries are accentuated by their dress, the language they speak, and their system of education which focuses mostly on religious studies. Affidavit of Israel Rubin, ¶¶ 7-15 (Resp. App. 15-17); 2 R. 447-448, 451-457.¹ See, Rubin, *Satmar: An Island in the City* (Quadrangle Books

¹ "J.A. ____" refers to the Joint Appendix. "____ R. ____" refers to the printed three-volume record filed in the New York Court of Appeals. "Resp. App. ____" refers to the Appendix to Respondents' Opposition to a Writ of Certiorari in Nos. 93-517, 93-527, and 93-539. "K.J. Pet. App. ____" refers to the Appendix to the Petition for a Writ of Certiorari in No. 93-517. "KJ Brief", "MW Brief" and "AG Brief" refers to the briefs submitted by petitioners in Nos. 93-517, 93-527, and 93-529 respectively.

1972); Mintz, *Hasidic People, A Place in the New World*" (Harvard University Press 1992); Kephart, *Extraordinary Groups* (St. Martin's Press 1991). In addition to separation from the outside community, Satmarer also observe separation of the sexes with few exceptions, such as within the confines of the immediate family, and in the case of children with disabilities. Gender separation is required to avoid "impure thoughts" which may cause a violation of the sexual code. Affidavit of Israel Rubin, ¶¶ 18-19 (Resp. App. 18); 2 R. 458-459.

Hasidim, including Satmarer, subscribe to a distinctive social order centered around the individual sect's religious leader known as the Rebbeh, who is the ultimate decision-maker in all matters of concern to his followers. A Rebbeh exercises his religious authority over all aspects of the life of members of his court. *Id.* at ¶¶ 8-9, 11 (Resp. App. 15, 16). Individuals questioning the Rebbeh's authority risk expulsion from the congregation and ostracism. For example, during the election to establish the first board of education for the school district at issue before this Court, the only candidate to run for election without the endorsement of the Rebbeh was expelled from the Village's main congregation, and his children expelled from the Village's religious schools after he refused to renounce his candidacy. *Waldman v. United Talmudic Academy*, 147 Misc.2d 529 (1990); 3 R. 592-641. Hasidim, including the Satmarer, further provide for their own self-governance by maintaining a separate system of justice, education and welfare. *See*, Affidavit of Israel Rubin ¶¶ 15-16; (Resp. App. 17); 2 R. 454-456.

The Satmar Hasidim came to the United States after World War II. Originally settling in the Williamsburg

section of Brooklyn in New York City, the Satmarer have since established additional communities at other locations in New York State, including Borough Park, also in Brooklyn, Monsey in Rockland County, and the Village of Kiryas Joel. *Id.* at ¶¶ 8,10 (Resp. App. 15-16). These population centers are led by a Rov or "town rabbi" appointed by the Rebbeh. Rofs enjoy a more modest form of status and authority than the Rebbeh, but nonetheless play a significant role in the leadership process. The Rov of the Village of Kiryas Joel, appointed by the Rebbeh himself, is the Rebbeh's son, Aaron Teitelbaum. *Id.* at ¶¶ 11-12 (Resp. App. 16).

From the time of their arrival in the United States, Satmarer have endeavored to protect their identity, rejecting attempts at acculturation and organizing separate communities with their own social structure and government. *Id.* at ¶¶ 7,14 (Resp. App. 15, 16). *See, Mintz, Hasidic People* at 27-42. Unlike the Amish, however, the majority of Hasidim find work outside their community. 2 R. 462.

To prevent undesirable acculturation, Satmarer, for instance, do not generally use television, radio or English language publications. Nor do they allow their children to attend school with others who belong to cultures deemed undesirable for Satmarer. Affidavit of Israel Rubin, ¶ 16 (Resp. App. 17); *Parents' Assn. of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986). Instead, Satmar children attend private religious schools established by the Satmar leadership to serve as the chief instrument for transmitting Satmar culture to future generations. Affidavit of Israel Rubin, ¶ 15 (Resp. App. 17). The majority

of boys and girls in the Village attend the official religious schools, although others attend a separate school organized by six Village families whose children were expelled from the official religious schools after the parents were accused of being disloyal to the religious leadership for questioning the quality of education being provided in the official religious schools. *Id.* at ¶ 13 (Resp. App. 16); 2 R. 436-439.

B. About the Village of Kiryas Joel.

Despite representations to the contrary, the incorporation of the Village of Kiryas Joel was not without controversy. (KJ Brief at 3-5). After the Satmar Hasidim's arrival in the Town of Monroe in the 1970s, a bitter contest ensued as the Satmarer sought to oppose the Town of Monroe's efforts to enforce its zoning regulations. (J.A. 8-16). The Satmar Hasidim presented the Town with an incorporation petition during the pendency of litigation over these issues.

Under the applicable statutory provisions, the Town Board was "foreclosed from passing upon the public good-or lack of it-in forming such a village" (J.A. 12, 14). Indeed, the Town Supervisor approving the petition observed that the Satmarer had "taken advantage of an . . . archaic State statute" which not only allowed them to evade the Town's zoning regulations but also to preclude the Town from advancing any objections to the formation of the new village. (J.A. 13-14). Because the area incorporated within the Village already had access to water supply, police and fire protection and sewer systems-the traditional factors prompting the need for self

incorporation-the Town Supervisor questioned the Satmar's need to incorporate. (J.A. 9-10).

In an effort to identify the reasons as to why the Satmarer might have wanted to incorporate their community into a Village, the Town noted several possible economic and sociological factors, including the Satmarer's preference for "disdained isolation from the rest of the community" (J.A. 10). In this context, he expressed his hope that the incorporation of the Village would bring about "a new era of well-being" between the Satmarer and the rest of Monroe, and that the Satmarer would understand they are not "above or separate" from the rules and regulations which govern "the people in whose midst they have chosen to reside" (J.A. 15).

The incorporation provided the Village residents an opportunity not only to enact their own zoning laws, but also to create an isolated community shielded from outside influences and governed by Orthodox religious tenets. Failure by the Satmarer "to adopt to some of the ways of life" of the surrounding community, the Town Supervisor feared, or continued attempts "to hide behind the self-imposed shade of secrecy or cry out religious persecution where there is none, will only lead to more confrontations as bitter as the one [his] decision purporte[d] to resolve" *Id.*

C. Prior litigation between the Satmarer and Public School Authorities.

Disputes over the delivery of remedial instruction, transportation and special education services to the Satmar

community have been the subject of judicial review in previous cases.

Parents' Assn. of P.S. 16 v. Quinones, 803 F.2d 1235 (2d Cir. 1986), involved efforts by the New York City Board of Education to provide remedial instruction to female students attending Satmar religious schools in the Williamsburg section of the City-the original and largest Satmar population center in New York State. Prior to this Court's decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), the services had been offered within the premises of the students' private religious schools. Thereafter, the City Board of Education adopted a plan to close off nine classrooms at P.S. 16 for the exclusive use of the Satmar students, where remedial services would then be provided separately from similar classes for the public school students.

The plan also provided for the assignment of only female, Yiddish-speaking teachers to teach the Satmar girls. 803 F.2d 1236-1237. However, the basis of the complaint filed to challenge the plan was that an establishment of religion in contravention of the First Amendment resulted from the erection of walls to separate Satmar and non-Satmar students which made the non-Satmar students feel "the walls [were] there to keep them out and that there are people who consider them undesirable" *Id.*

The United States Court of Appeals for the Second Circuit determined that the plan created a "symbolic link" between the state and the Satmarer which was likely to be perceived by the Hasidim and others as

governmental support for the separatist beliefs and practices of the Satmar community. Moreover, to impressionable young minds, the plan would appear to endorse not only separatism but the derogatory disdain of the Satmar for other cultures. 803 F.2d 1241.

In its decision, the *Quinones* court noted statements made by various members of the Hasidic community which reflect the intrinsic separatist position of the Satmar community. According to one such member,

[the Satmar Hasidim] struggle very hard to maintain [their] belief and [their] culture [They] want [their] children separate The issue goes to the heart of the Orthodox tradition, which requires the separation of males and females for virtually every activity, including schooling, and encourages isolation from other cultures. If we have our kids learning with them, they'll be corrupted We don't hate these people, but we don't like them. *We want to be separate. It's intentional.* 803 F.2d 1238 (Emphasis added).

At present, the school district created by the statute before this Court is responsible for providing to the Village's parochial school students services similar to those provided in *Quinones* in an exclusive Satmar setting similar to the one struck down in that case.

Bollenbach v. Bd. of Educ. of the Monroe-Woodbury Central School Dist., 659 F.Supp 1450 (SDNY 1987), involved requests by Village residents that petitioner Board of Education of the Monroe-Woodbury Central School District ("Monroe-Woodbury") assign only male drivers to transportation routes servicing Satmar male students attending the Village's religious schools because Satmar

religious tenets restricting interaction between the sexes prevented the male students from boarding buses driven by female drivers and from taking instructions from them. To accommodate these requests, Monroe-Woodbury removed the female drivers even though they were entitled to the routes as a result of their seniority pursuant to the terms of their existing collective bargaining agreement. 659 F.Supp at 1453. However, it eventually became necessary to reassign female drivers to these routes and Village residents commenced an action before the United States District Court for the Southern District of New York alleging, *inter alia*, that the failure to provide them with male drivers violated their rights under the Free Exercise Clause of the United States Constitution. 659 F.Supp at 1454-55.

Basing its decision on this Court's ruling in *Bowen v. Roy*, 476 U.S. 693 (1986), the District Court ruled that "failure to tailor bus service to the Hasidim's belief would not violate the Free Exercise of the Constitution" holding that attempts to alter "bus service to suit the religious tenets of the Hasidim violated the Establishment Clause" 659 F.Supp at 1470. According to the District Court, the deployment of only male drivers would have the primary effect of advancing Hasidic religious beliefs and result in both excessive administrative and political entanglement. 659 F.Supp at 1464-1466.

At present, the school district created by the statute before this Court bears the statutory responsibility of providing transportation to the *Bollenbach* students to and from their private religious schools.

Board of Education of the Monroe-Woodbury CSD v. Wieder, 134 Misc.2d 658 (1987); 132 AD2d 409 (2d Dept. (1987)); 72 NY2d 174 (1988), concerned the issue of whether Village residents were entitled to obtain publicly-funded special education and related services in an environment separate from non-Satmar students. In 1983, Village residents had formed a school for children with disabilities within an annex to the Village's religious school for girls. The school was attended not only by Village residents but also by children with disabilities from other Hasidic communities in a neighboring county. Monroe-Woodbury public school teachers offered special education classes within the school until that school district terminated such services in response to this Court's decisions in *Aguilar v. Felton*, 473 U.S. 402 (1985) and *School Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985). 72 NY2d 174, 180. Thereafter, Monroe-Woodbury proceeded to place these children in classes within its public schools in accordance with the individualized education plan required and developed for each child under federal and state law. Monroe-Woodbury also engaged in attempts to integrate the Satmar children into the public school environment by securing the services of Yiddish-speaking teachers, and providing the parents with bilingual reports. 72 NY2d at 181.

Despite reports submitted to the *Wieder* courts that Satmar children who, for a while, attended the programs in the public school facilities indeed continued to progress, Satmar parents refused to continue sending their children to Monroe-Woodbury's public schools alleging that the programs offered their children were inappropriate because of the fear and trauma experienced by the

children when leaving their own community and being with people whose ways were so different from theirs. The Satmar parents held firm to their position that the bilingual and cultural needs of their children could be satisfactorily met only within the confines of a separate environment. *Id.*

Monroe-Woodbury then sought a judicial declaration that under New York's Education Law it lacked the statutory authority to provide services to the Village children except within its own public schools. Instead, the lower court in *Wieder*, directed Monroe-Woodbury to provide the necessary services at a location not physically or educationally identified with the Village but, nonetheless, reasonably accessible to the children. 134 Misc.2d 658, 662-663. Monroe-Woodbury then appealed that order and the Appellate Division, Second Department, reversed after determining that the provision of services in a separate environment addressed parental concerns for their religious and social practices rather than secular factors such as the nature of the children's disability, in violation of the Establishment Clause. That court further ruled that Monroe-Woodbury could provide the required services only within its public school facilities, not separate from public school students. 132 AD2d 415-416, 417-418; 72 NY2d 181-82.

On appeal to the New York Court of Appeals, that court did not reach the constitutional issue, limiting itself to interpreting whether New York's Education Law required Monroe-Woodbury to provide services to Village residents only in its public schools or at some other facility. That court then ruled that the applicable statutory provisions required neither. In its decision, the Court of

Appeals refused to address the argument that the placement of Village children in Monroe-Woodbury's public schools rather than in their own schools or at a neutral site "interfere[d] with the free exercise of their sincere religious beliefs . . . " 72 NY2d 174, 188. Contrary to the suggestion by petitioner Board of Education of the Kiryas Joel Village School District ("KJVSD"), at pp. 7-8, 30 of its brief, the Court of Appeals' refusal was based solely on the fact that this was not the claim the Village residents had asserted and supported below.

D. Establishment of the Kiryas Joel Village School District.

The New York Governor and the Legislature enacted Chapter 748, ("the statute"), subsequent to the New York Court of Appeals decision in *Wieder*. The legislative history of the statute clearly indicates they both understood the legislation was designed to provide an insular religious community with its own school district so that its children could receive an education within an insular environment. Both the Legislature and the Governor understood that the need for this exclusivity was dictated by religious beliefs and traditions. (J.A. 19-20, 38-39, 40-42).

Indeed, prior to the enactment of the statute, the New York State Commissioner of Education, through his counsel, expressed numerous concerns that a school district designed to be attended by members of only one religious sect involved government in the "furtherance of religion" in violation of the Establishment Clause. (J.A. 28). The Commissioner also expressed his view that the

statute cannot be supported against "the goal of maintaining diversity . . . and ensuring that school district boundaries are not drawn in a manner that segregates pupils along ethnic, racial or religious lines" *Id.* Purportedly established to serve the Village's disabled students, the KJVSD is empowered to serve a general student population as well. However, non-disabled students residing within the Village were always expected to continue attending their religious schools. (J.A. 21-22, 32). Moreover, it was always envisioned that the KJVSD would only serve Hasidic students. (J.A. 22).

As further indicated by the Commissioner, the establishment of the KJVSD runs counter to New York State's Master Plan for School District Reorganization which, pursuant to New York Education Law § 314, promotes the reorganization and consolidation of smaller school districts to encourage economy and efficiency in the state's public education system. Affidavit of Hon. Thomas Sobol ¶ 16 (J.A. 81). As of October 29, 1990, when the KJVSD first became operational, only 33 students were enrolled and receiving services from the district. Twenty of those were nonresident Satmar students, including three from petitioner Monroe-Woodbury. Affidavit of Hon. Thomas Sobol, ¶ 16 (J.A. 81); Affidavit of Hannah Flegenheimer, ¶ 17 (J.A. 89). Based on data submitted to the New York State Education Department by the KJVSD, during the 1991-1992 school year, the KJVSD served only 10.9 full-time resident students. During the 1992-1993 school year, the KJVSD served 13 full-time students and 95 parochial school students on a part-time basis in addition to 29 nonresident students. Affidavit of Hon. Thomas Sobol, at

¶¶ 8-11 (Resp. App. 3-4); Affidavit of Gregory Illenberg, at ¶¶ 15-17, 22, 24 (Rep. App. 9, 10).

Despite representations to the contrary, the KJVSD is unlike other union free school districts created to provide educational services exclusively to students with disabilities. (KJ Brief at 8 fn3). Those school districts, unlike the KJVSD, are associated with private child care institutions and are statutorily governed by Article 81 of New York's Education Law. Their powers are limited by statute and the very legislative acts which create them. Their student population is not set along geographical boundary lines. Children are placed there by family court, the local social services district, or the division for youth. Unlike, at the KJVSD, children are placed at those school districts only after a determination that the institution offers the least restrictive educational environment for students placed there. (J.A. 29). In addition, those school districts, unlike the KJVSD, may not refuse placements of students who are residents of other public school districts. Neither are they authorized to serve a general student population.

Indeed, although purportedly established to provide services only to the Village's disabled students, during the pendency of this litigation, the KJVSD initiated plans, now in abeyance, to establish a regular education kindergarten program. (Resp. Pet. 20, 23, 24). Also, unlike those school districts, the KJVSD is responsible for providing both disabled and nondisabled parochial school students with remedial instruction, transportation, textbooks and health and welfare services. *See, e.g.,* New York Education Law §§ 701; 912; 1709; 3602-c; 3635).

E. Education of Children with Disabilities

Pursuant to both federal and state law, school districts must provide children with disabilities with a "free appropriate public education" which requires that "special education" and "related services" be provided at public expense, in conformity with an "individualized education program" (IEP), tailored to meet the unique needs of the individual student with disabilities. All students with disabilities are entitled to receive these services in the district where they reside.

A child's IEP must identify the child's special education needs and the annual goals for the child, based on a comprehensive evaluation of the child and developed with the participation of the child's parents. Educational services must be provided in the "least restrictive environment," (LRE) appropriate to meet the needs of the student as identified in the IEP. Parents disagreeing with the placement of their child may request a due process review hearing, and ultimately may appeal any such decisions to the Courts. Affidavit of Hannah Flegenheimer, ¶¶ 7,9,11 (J.A. 85, 86); 34 CFR 300.500-300.514; 8 NYCRR 200.5.

"Special classes, separate schooling, or other removal of handicapped children from the regular educational environment . . . occur only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily" *Id.* at ¶ 11 (J.A. 86). Students who cannot benefit from instruction in a regular classroom, must, nonetheless, be afforded the opportunity to

interact with their non-handicapped peers in non-academic areas, i.e., recess, lunch, music, art, gym, etc. *Id.* at ¶ 12 (J.A. 86).

The KJVSD, as a school district established to serve only disabled children, is unable to provide its students the opportunity to be placed in regular education classes with non-disabled children, or to interact in nonacademic areas with their non-disabled peers. *Id.* at ¶ 23 (J.A. 90).

F. The Decisions Below

Respondents commenced this action in New York State Supreme Court, Albany County, seeking a declaration that Chapter 748 was constitutionally infirm under both the Federal and State Constitutions. Applying the tripartite test established by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the lower court ruled the statute violated all three prongs. According to the court, the statute lacked a secular purpose because it created a governmental unit, a school district, to meet the exclusive "parochial" needs of the Village residents. The creation of the KJVSD, the lower court found, was nothing less than "an attempt to camouflage, with secular garments, a religious community as a public school district." (K.J. Pet. App. 100a). According to the lower court, the Village and its coterminous school district "is an enclave of segregated individuals who share common religious beliefs which shape the social, political and familial mores of their lives from cradle to grave." *Id.* "Labeling the village as a 'union free public school district' cannot alter reality." (K.J. Pet. App. 99a).

The lower court further found the statute also failed the second prong of *Lemon* because "rather than serving a

legitimate governmental end, [it] was enacted to meet exclusive religious needs and has the effect of advancing, protecting and fostering the religious beliefs of the inhabitants of the school district." (K.J. Pet. App. 99-a). In addition, the statute fostered excessive governmental entanglement with religion in violation of the third prong of *Lemon* because it placed the New York State Education Department, the state agency responsible for overseeing implementation of the statute, in the position of having to "take special steps to monitor the . . . school district to ensure that public funds are not expended to further religious purposes" (K.J. Pet. App. 100-a).

In a 4 to 1 decision, the Appellate Division, Third Department, affirmed the lower court's determination that Chapter 748 was unconstitutional. Responding to the position advanced by the dissent and the petitioners herein that the legislation had the secular purpose of providing needed special educational services to Village residents not receiving the services, the Appellate Division majority noted that the design of the statute was not merely to provide special education services to the Village's disabled students, "but to provide those services within the Village, so that the children would . . . avoid mixing with children whose language, lifestyle and environment are not the product of [their] religion" (K.J. Pet. App. 67a).

The Appellate Division majority further determined that the legislation had the principal or primary effect of advancing religion because the creation of the KJVSD coterminous with a religious community "to provide within that enclave services that were already available elsewhere" effected an impermissible union between

church and state "[r]egardless of how scrupulous the district is in maintaining the secular nature of the educational services offered at the school" (K.J. Pet. App. 69a-70a). The Appellate Division saw no need to consider the third prong. *Id.* at 73a.

The New York State Court of Appeals, by a 4 to 2 vote affirmed the determination of the Appellate Division that Chapter 748 has the impermissible primary effect of advancing religion. According to the Court of Appeals, because services were already available from Monroe-Woodbury, the primary effect of the statute was to yield to the demands of the Satmar community that their children be insulated from others in accordance with their religious practices. (K.J. Pet. App. 15a). Thus, the statute effected a symbolic union between church and state "sufficiently likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by non-adherents as a disapproval of their individual religious choices" (K.J. Pet. App. 12a).

Counter to the dissent, the Court of Appeals plurality refused to view the statute as part of a general government program, because it was intended to benefit one religious group, rather than to provide services without regard to the locality and environment in which said services are provided. (K.J. Pet. App. 14a; 20a, 24a-25a; 32a). The plurality also refused to view the statute as effecting "a 'unit on a neutral site' serving only sectarian pupils" determining, instead, that, by creating an entirely new school district, the statute exceeded any directive by this Court or the Court of Appeals concerning the provision of services to children at a neutral site. (K.J. Pet.

App. 15a). However, the Court of Appeals did not dismiss the possibility reflected in Judge Kaye's concurrence, that consistent with observations made by the Court of Appeals in its *Weider* decision, *supra.*, there, "may well be that certain of the services in controversy could be furnished to [Village residents] at neutral sites . . . in conformity with constitutional principles" *Id.* See, *Board of Education of the Monroe-Woodbury Central Dist. v. Wieder*, 72 NY2d at 189 fn3.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents a facial challenge to a New York State statute which confers upon an exclusive religious community the extraordinary benefit of a separate public school district to enable that community to receive public educational services in an environment which conforms with the community's religious beliefs and traditions. The statute carved out a new school district for this community even though the services to be provided therein had always been available from the school district to which the community previously belonged.

This statute violates fundamental Establishment Clause principles which prohibit "sponsorship, financial support, and active involvement of the sovereign in religious activity" *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 668 (1970); and preclude government from imbuing a religious sect with governmental powers, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), or providing a denominational preference *Larson v. Valente*, 456

U.S. 228 (1982). Irrespective of whatever standard may be used in assessing Establishment Clause violations, the statute violates these fundamental principles.

Chapter 748 is not a constitutionally permissible accommodation of religion. Petitioners do not identify a governmentally imposed burden on the free exercise of Satmar religious beliefs and practices as required by this Court's precedents. See, *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 613 (1989), citing *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S., at 348 (O'Connor, J., concurring in judgment). Even if the petitioners had identified a specific governmentally-imposed burden, nonetheless, the extraordinary accommodation of government utilizing its instrumentalities to provide a religious community with a separate public school district in accordance with religious beliefs and practices fosters religion in violation of the Establishment Clause. The statute requires the active participation of government in the pursuit of private religious practices.

The New York Court of Appeals properly determined that the statute has the primary effect of advancing religion in violation of the second prong of this Court's three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As the Court of Appeals found, the cultural needs of the children of Kiryas Joel are inextricably linked to fundamental Satmar religious beliefs which define the essence of Satmar culture, and dictate, in relevant part, that Satmar children be educated separately and apart from non-Satmar students. Thus, the remedy effected by the statute herein establishes an impermissible union between church and state which has the primary effect of

advancing religion. This impermissible symbolic union is furthered by the law's "overbreadth" which grants the school district "vast" powers well beyond those necessary to address the concerns of the Village residents. (K.J. Pet. App. 26a-27a). The remedy effected by the statute goes well beyond the suggestion of the Court of Appeals in *Monroe-Woodbury v. Wieder*, 72 NY2d 174, 189 fn3 when it held, "it may well be that certain of the services in controversy could be furnished to defendants at neutral sites . . . in conformity with constitutional principles."

Assertions that the KJVSD, in its operations, provides secular services, does not correct the constitutional infirmity because the statute was itself enacted to create a school district which separates people along religious lines and, therefore, its very existence violates the Establishment Clause.

Petitioners' reliance on this Court's decision in *Wolman v. Walter*, 433 U.S. 229 (1977) for the proposition that the KJVSD is a functional equivalent of a "neutral site" facility is misplaced. In *Wolman* this Court held constitutional the provision of a neutral site off the premises of a religious school for children to receive therapeutic and remedial services. This Court held the neutral sites constitutional even though the Court understood that such neutral sites *on occasion* might serve only sectarian pupils. Here in contrast, the KJVSD serves only Satmar children by design. Furthermore, unlike the neutral sites in *Wolman* which this Court upheld because their existence was based upon considerations of safety, distance and the adequacy of accommodations, the KJVSD was created solely upon considerations of the religious background of the children it serves.

The statute also fails the first prong of *Lemon* because it has no secular purpose. Finally, the statute also fails the third prong of *Lemon* because it fosters an excessive entanglement with religion.

ARGUMENT

I. CHAPTER 748 VIOLATES FUNDAMENTAL ESTABLISHMENT CLAUSE PRINCIPLES

The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." Written as a broad charter, the Clause has come to prohibit more than the establishment of a state or national religion. It also forbids government from undertaking actions which favor religion over nonreligion, or a particular denomination over another. *See, e.g., Lee v. Weisman*, 112 S.Ct. 2408 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Larson v. Valente*, 456 U.S. 228 (1982).

At its most fundamental level, the Establishment Clause represents the Framers' attempt to protect a democratic nation from political fragmentation along religious lines by precluding government from "exert[ing] its power in the service of any purely religious end . . . [and from] mak[ing] of religion, as religion, an object of legislation" *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 234 (1963) (Brennan, J., concurring). Based on the premise that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere[.]" *McCullum v. Board of Education*, 333 U.S. 203, 212 (1948), the Clause, at

its very core, denounces "sponsorship, financial support, and active involvement of the sovereign in religious activity" *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 668 (1970).

Application of these principles to specific cases has at times been made difficult by debate over what specific standard to employ in assessing alleged violations of the Clause. However, the standard generally used to make such determinations is the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which petitioners urge this Court overrule, if necessary, to uphold the constitutionality of the statute at issue herein. Cf. *Zobrest v. Catalina Foothills School Dist.*, ___ U.S. ___, 113 S.Ct. 2462 (1993), *Lee v. Weisman*, ___ U.S. ___, 112 S.Ct. 2649 (1992) *Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, *supra*. The test, with its purpose, primary effect and entanglement prongs distills the factors considered by the Court in pre-*Lemon* cases. See, *School Dist. of Abington Township v. Schempp*, *supra* at 222 ("The test may be stated as follows: what are the purpose and the primary effect of the enactment?"); *Walz v. Tax Comm'n of the City of New York*, *supra* at 674 (the end result of a statutory enactment may not be "excessive government entanglement with religion").

For the reasons set forth below at Point III, Chapter 748 fails all three prongs of the *Lemon* test. But should this Court choose to overrule *Lemon*, the statute would nonetheless remain constitutionally infirm under any alternatively adopted standard which sustains the fundamental principles of the Establishment Clause and this Court's past precedents. The contested statute clearly contravenes both.

Indeed, as ruled by the courts below, the statute communicates an endorsement of religion. An objective observer familiar with the facts and circumstances leading up to the creation of the KJVSD is likely to perceive the creation of the KJVSD as such an endorsement. (J.A. 70a). Furthermore, this Court has repeatedly indicated that Establishment Clause violations do not depend upon a showing of direct governmental coercion. *See, Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 785 (1973); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 223; *Engle v. Vitale*, 370 U.S. 421, 430 (1962). Therefore, respondents urge this Court not to adopt such a standard as this Court's sole criterion for assessing Establishment Clause violations. In addition, a coercion standard does not necessarily address all the various ways in which the Establishment Clause could be violated, resulting in the possible evisceration of the Establishment Clause.

As set forth above, as a matter of legal form, the Satmar community of Kiryas Joel is an incorporated municipality of the State of New York. Reaching past mere formalism, however, the Village is, as a matter of fact, a religious enclave under the control and supervision of the Satmar religious leadership which exercises its religious authority over all aspects of daily life from dress to diet, from cradle to grave. The establishment of a separate public school district within the exclusive boundaries of the Village, imbues this religious community with the qualities of a governmental unit authorized to exercise discretionary governmental powers in the arena of public education. Following a longstanding intractable religious problem over the manner in which

public special education services were to be provided to Village residents, the statute effects nothing less than the empowerment of the Satmar community of Kiryas Joel to tailor public education to meet the requirements of its religious beliefs and traditions.² Such delegation effectuates the very type of intrusion between church and state into the precincts of the other which the Framers sought to foreclose, *see, e.g., Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982). Indeed, "[t]he Framers did not 'set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions'." *Id.*

Furthermore, Chapter 748 is not a statute of general applicability which extends its benefits without regard to religion. *See, Zobrest v. Catalina Foothills School Dist.*, 112 S.Ct. 2462 (1993). Instead, the statute aims to benefit exclusively one religious sect. It provides the Satmar community of Kiryas Joel with its own public school district where Satmar children can be educated separate from non-Satmar students. As anticipated at the time of the statute's enactment, should any non-Hasidic child move into the Village "(and this would be virtually impossible)" he or she would be tuitioned to neighboring Monroe-Woodbury. (J.A. 22). Consequently, the statute effects a preferential treatment of the type forbidden by

² It was understood when the statute was adopted that Satmar religious preferences dictate that children be educated separately. Indeed, the statute was adopted in response to this requirement. Therefore, any allegations as to the secular operation of the district does not correct the constitutional infirmity brought about by the very formation of the district. (J.A. 19-20 38-39, 40-42).

the Establishment Clause, *see, e.g., Larson v. Valente, supra*, for "a forbidden denominational preference can result from a grant of benefits to one religious group as readily as discrimination among sects" (K.J. Pet. App. 23a).

Nowhere in Establishment Clause jurisprudence has this Court been more vigilant than in cases involving religion and public education, where government's activities "can have a magnified impact on impressionable young minds" and "a union of church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." *School Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 372, 383, 390 (1985). "[T]he symbol of our democracy and the most pervasive means of promoting our common destiny[.]" *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987), citing *Illinois ex. rel. McCollum v. Board of Education*, 333 U.S. 203, 231 (1948) (opinion of Frankfurter, J.), public schools must discharge their public function of training students for citizenship in a heterogeneous democratic society ". . . in an atmosphere free of parochial, divisive, or separatist influences of any sort. . . ." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 241-242 (1963) (Brennan, J., concurring). (*Bethel School Dist. No. 403 v. Fraser*, 106 S.Ct. 3159 (1986)).

Upholding the creation of a separate public school district along religious lines to oblige a religious sect's separatist practices would contravene these fundamental principles. Indeed, as the lower court observed, "[t]he strength of our democracy is that a multitude of religious, ethnic and racial groups can live side by side with respect

for each other." (K.J. Pet. App. 101a). *See generally, Brown v. Board of Education*, 347 U.S. 483 (1954). Governmental action effectuating the separation of public school students along religious lines conveys the opposite message to our nation's children in contravention of the principles espoused by the Establishment Clause. "To hold that a state cannot consistently with the First Amendment . . . utilize its public school system to aid any or all religious sects in the dissemination of their doctrines and ideals, does not . . . manifest a governmental hostility to religion or religious teachings." *McCullum v. Board of Education*, *supra* at 211.

II. CHAPTER 748 IS NOT A VALID ACCOMMODATION OF RELIGION

Petitioners KJVSD and Monroe-Woodbury urge this Court to uphold Chapter 748 as a valid accommodation of religion. (KJ Brief at 40-43; MW Brief at 38-45). They do not contend that the accommodation is mandated by the Free Exercise Clause, but rather assert that it is permissive. (KJ Brief at 42). However, petitioner KJVSD does not advance a specific free exercise claim.

To be permissible under the Establishment Clause, governmental accommodation of religion must lift an identifiable burden on the free exercise thereof imposed by government itself. *See, e.g., Corporation of Presiding Bishop of the Church of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). *See also, McConnell*,

Accommodation of Religion, 1985 S.Ct. Rev. 1, 3-4. Here, the KJVSD itself fails to articulate the religious belief or practice infringed upon, the nature of the burden allegedly lifted by the statute, and the particular circumstance through which government had imposed any such burden on the residents of Kiryas Joel.

Assuming arguendo, that Chapter 748 indeed constitutes an effort to lift an identified governmentally imposed burden on the free exercise of Satmar religious beliefs and precepts, the issue then becomes whether the creation of the KJVSD to lift such a burden survives constitutional scrutiny under the Establishment Clause. As this Court has observed, government may act to accommodate religion, but at some point, "accommodation may devolve into 'an unlawful fostering of religion' " in violation of the Establishment Clause. *Corporation of Presiding Bishop of the Church of Latter-Day Saints v. Amos*, *supra* at 334-335; *Hobbie v. Unemployment Appeals Comm'n of Florida*, *supra* at 144; *see, Thomas v. Review Board of Indiana Employment Security Division*, *supra* at 719; *Sherbert v. Verner*, *supra* at 409. Although this Court has never before reviewed such a case, respondents respectfully submit that the alleged accommodation effected by Chapter 748 constitutes an unlawful fostering of religion. The statute imbues a religious community with discretionary governmental powers and establishes an impermissible symbolic union between church and state. *See*, discussion at Points I and III.

Furthermore, this case presents an "alleged" accommodation which does not fall along the lines of previous accommodation cases reviewed by this Court, and relied upon by petitioners. Those cases involved claims for exemption from laws of general applicability, *see, e.g.,*

Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Amos, *supra*; *Hobbie v. Unemployment Appeals Comm'n of Fla.*, *supra*; *Bowen v. Roy*, *supra*; *Sherbert v. Verner*, *supra*, and petitioners herein have made no claim for an exemption. Instead, this case involves the extraordinary measure taken by the State of New York of creating a public school district for the exclusive benefit of a religious community in order to oblige the religious beliefs and practices of that community. Moreover, unlike previous accommodation cases where government merely granted an exemption which allowed the private pursuit of religious beliefs and practices, Chapter 748 requires the State of New York itself to allocate its resources in the pursuit of the religious beliefs and traditions of the Satmar community of Kiryas Joel.

To the extent petitioners rely on this Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), (KJ Brief at 41-42; AG Brief at 25, 29, 31; MW Brief at 39-41), respondents submit that case is inapposite. Petitioners rely upon *Yoder* for the proposition that since this Court in *Yoder* did not find that accommodating the requests of the Amish to have their children exempted after the eighth grade from compulsory school attendance constituted government sponsorship or active involvement in Amish beliefs, (KJ Brief at 42), Chapter 748 likewise does not sponsor or support Satmar religious precepts. However, as set forth above, in *Yoder*, unlike the present case, the Amish, after demonstrating a clear free exercise claim, were provided with an exemption from a generally applicable state law and the State of Wisconsin was not required to actively sponsor or support Amish beliefs. In the present case, the contested legislation actively involves the State of New

York in sponsoring and supporting Satmar separatist religious preferences by going to the extraordinary length of providing this insular religious community with its own separate school district.

The alleged accomodation effected by the statute herein, might be "laudatory and reflect the political process straining to meet the parochial needs of a religious group" but it nevertheless violates the Establishment Clause. (K.J. Pet. App. 100a).

III. CHAPTER 748 FAILS CONSTITUTIONAL SCRUTINY UNDER THE THREE-PART TEST OF *LEMON V. KURTZMAN*.

To survive constitutional scrutiny under the three-part test articulated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), legislation must have a secular purpose and a principal or primary effect which neither advances nor inhibits religion. In addition, it may not foster excessive entanglement between church and state. Failure to satisfy any of these criteria has been deemed to effect a violation of the Establishment Clause. The New York State Court of Appeals in its decision below declared Chapter 748 unconstitutional on the basis that it violated the second prong of *Lemon*. Respondents submit that this determination was proper. In addition, the statute lacks a secular purpose and fosters excessive governmental entanglement with religion.

That respondents maintain this litigation as a facial challenge to the statute in no way impairs this Court's ability to affirm the determination below that Chapter 748 is constitutionally infirm. Petitioner KJVSD suggests that

this Court's ruling in *United States v. Salerno*, 481 U.S. 739, 745 (1987) and others preclude a finding of facial invalidity arguing that, in this case, it cannot be said there is no "set of circumstances under which the Act would be valid" (KJVSD Brief at 19-20). However, this Court has, indeed, previously entertained Establishment Clause challenges to statutes solely on their face. See, *Bowen v. Kendrick*, 487 U.S. 589, 600-601, 602, citing *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Mueller v. Allen*, 463 U.S. 388 (1983); *Wolman v. Walter*, 433 U.S. 229 (1977); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). Moreover, this Court in *Bowen v. Kendrick* refused the invitation to apply such a standard in the context of its Establishment Clause jurisprudence. Indeed, the adoption of such a standard would eviscerate the Establishment Clause. 487 U.S. 589, 627 fn.1 (Blackmun, J., dissenting).

Furthermore, petitioners' reliance in *Bowen v. Kendrick*, *supra*, for the proposition that Chapter 748 survives constitutional scrutiny under *Lemon* is misguided, as that case is factually inapposite to the present one. In *Bowen v. Kendrick*, the benefit accruing to religious organizations under the Adolescent Family Life Act (AFLA) resulted from a program that enabled religious organizations to become grantees along with a broad-based spectrum of other organizations whose cooperation the government sought in an effort to integrate and coordinate a multiplicity of services. Also, in that case government sought the assistance of non-governmental organizations because government alone could not successfully provide the services set forth in AFLA. By contrast, the religious community benefited by the statute herein is its sole

intended beneficiary, and public education, unlike the services under AFLA is an exclusive public function which government can fulfill on its own. Likewise, this Court's decision in *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970) is inapposite because the tax exemption upheld there for religious organizations was granted as part of a benefit afforded to a broad class of property owners, not just to religious organizations.

A. Chapter 748 has the Primary Effect of Advancing Religion.

The relevant inquiry under the "effect" criterion is whether, irrespective of its actual purpose, a contested governmental act has the principal or primary effect of advancing or inhibiting religion. *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985). As the New York State Court of Appeals observed, this prohibition extends beyond acts directing or funding efforts at religious indoctrination. (K.J. Pet. App. 10a). It also precludes state action which "fosters a close identification of [governmental] powers and responsibilities with those of any or all religious denominations." It forbids any "'symbolic union of church and state' which conveys a message of government endorsement or disapproval of religion" *Grand Rapids, supra*, at 389. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). Chapter 748 fosters a symbolic union between state and church which impermissibly advances Satmar religious beliefs and practices.

(1) Neutral Site Equivalency – Characterizing the KJVSD as the functional equivalent of a "neutral site"

facility, petitioners urge this Court to uphold the constitutionality of Chapter 748 pursuant to *Wolman v. Walter*, 433 U.S. 229 (1977). (KJ Brief at 30; AG Brief at 20; MW Brief at 32). In that case, this Court concluded that it was permissible to provide parochial school students with therapeutic and remedial services at a neutral site off the premises of the religious school, even if *on occasion* such a site might serve only sectarian pupils. However, as the New York Court of Appeals observed in its decision below, Chapter 748 goes beyond any directive sanctioning the provision of services to parochial school students at a neutral site. (K.J. Pet. App. 15a). The KJVSD was created not based on "considerations of safety, distance and the adequacy of accommodations" contemplated by this Court in *Wolman*, but rather on the preferences of the Village community for a segregated educational environment.

In addition, the KJVSD is a fully operational school, rather than the type of neutral site sanctioned by this Court in *Wolman* and other courts in cases such as *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991); *Walker v. San Francisco Unified School Dist.*, 761 F.Supp. 1463 (N.D. Cal. 1991), and indeed contemplated by the New York State Court of Appeals in *Monroe-Woodbury v. Weider*, 72 NY2d 174, 189 for parochial school students to receive *supplemental* services such as remedial instruction and therapeutic assistance. The constitutional infirmity in the present case arises not from the provision of supplemental services at a separate facility in accordance with this Court's ruling in *Wolman*. Rather, it arises from the creation of a fully operational school deliberately established along religious lines to replace a public school

environment. Therefore, "the primary effect of such an extensive effort to accommodate the desire to insulate the Satmarer Hasidic students inescapably conveys a message of governmental endorsement of religion" (K.J. Pet. App. 15a).

In this context, given that Monroe-Woodbury appears before this Court defending the KJVSD as the constitutional functional equivalent of a neutral site, there should be no impediment for Monroe-Woodbury to provide supplemental services at such a neutral site if this Court affirms the decisions below. Moreover, the Commissioner of Education of the State of New York, has indicated "the State Education Department is fully prepared to assist the Monroe-Woodbury Central School District to provide appropriate special educational services to all children entitled to receive them from the Kiryas Joel Village School District" Affidavit of Hon. Thomas Sobol, ¶ 6 (Resp. App. 2-3).

(2) Religious v. Secular Need for Separation – According to petitioners, the Court of Appeals' decision is erroneously based on a misconception that Satmar religious tenets prevent Satmar Hasidim from interacting with persons of other faiths, (KJ Brief at 29), and a failure to recognize that the KJVSD boundary lines were drawn to meet unique secular needs. (KJ Brief at 29-30; AG Brief at 18; MW Brief at 7, 16).

Such an assertion, however, belies the understanding of the New York State Legislature and the Governor that enactment of Chapter 748 effected a resolution of a *religious* conflict. (J.A. 19; 38; 40). Moreover, it impugns the position previously taken by Village residents before the

New York Court of Appeals in *Board of Education of the Monroe-Woodbury CSD v. Wieder*, 72 NY2d 174, 188, where they asserted a free-exercise right to a separate educational facility. In that case, unlike in the present action, Village residents argued that "public school placements interfere with the free exercise of their sincere religious beliefs . . . [and] that compelling the children to attend regular public school classes and programs forces them to choose between following the precepts of their religion and foregoing benefits on the one hand, and accepting benefits while violating their religious beliefs on the other." (citations omitted). Despite representations to the contrary, the *Wieder* Court did not reject this argument on the merits. (KJ Brief at 7-8). Rather, it noted it could not entertain the argument because, that was not the claim the Satmarer had raised in the lower courts. Similarly, here the KJVSD did not make any Free Exercise argument until the Court of Appeals, when it argued in the alternative that the statute accommodated a religious observance.

Petitioners' assertions are also contrary to the understanding of the Attorney General in his initial defense of Chapter 748, when both at Point II of the brief and during oral argument before the lower court, he argued that "The Statute Does Not Support Religion, And Removes A Deterrent To The Free Exercise Of Religion."

In this context, representations that the Court of Appeals in *Wieder* ruled "the emotional impact on the children of traveling outside the Village was a 'non-religious reason' for taking the children out of . . . Monroe-Woodbury" (KJ Brief at 30) are misleading because that court did not address this issue. Instead, in

refusing to entertain a free exercise argument raised for the first time before it, the Court of Appeals merely acknowledged that the Village residents' claims for exemption from public school placements were based only on reasons, characterized by Village residents as nonreligious. (72 NY2d 188-189).

Additionally, assertions that Chapter 748 meets the requirements of the second prong of *Lemon* because it provides for secular bilingual, bicultural services lacking in Monroe-Woodbury (AG Brief at 16) are equally misleading. As the Court of Appeals' decision in *Wieder* indicates, Monroe-Woodbury undertook efforts to accommodate the bicultural, bilingual needs of the Satmar community, including the employment of Yiddish-speaking teachers and the provision of reports for the Satmar parents in Yiddish. (72 NY2d at 181). As such, prior to the creation of the KJVSD, Village residents were offered such services. Furthermore, since, before the Appellate Division in *Wieder*, Village residents asserted their willingness to forego instruction in Yiddish if that court granted their request for a site where their children could be educated separate from non-Satmar students, they very clearly articulated that it was a separate site which they were after and not bicultural, bilingual services. (132 AD2d at 415-416).

Further assertions that the statute merely confers an incidental benefit on Satmar beliefs and traditions, (AG Brief at 19), are equally unavailing because a segregated environment in which to pursue their traditions is precisely what the Village residents sought and the statute afforded them.

(3) Shared Religious Heritage – Petitioners further argue that simply because the Village residents share a common religious heritage the State should not be precluded from enacting the contested legislation herein, nor should the Village be deprived of its own public school district merely because the board of education will of necessity be composed only of Satmarers. (KJ Brief at 16, 33-35; AG Brief at 21-23; MW Brief at 8, 20-23). In this context, petitioners' reliance on *McDaniel v. Paty*, 435 U.S. 618 (1978), is misguided because that case is factually inapposite to this one. There, in invalidating a Tennessee law which disqualified clergymen from participating as delegates to that state's constitutional convention, this Court noted the absence of any evidence that clergymen would be unable to discharge the duties of public office unfettered from anti-establishment interests. (435 U.S. 618, 629). Here, however, the record reflects that the religious leadership of the Satmar Hasidim has exerted its influence over the operations of the KJVSD and its board of education members. This point is illustrated in the case of *Waldman v. United Talmudic Academy*, 147 Misc. 2d 529 (1990) where the only individual to run for the KJVSD board of education without the approval of the Satmar religious leadership endured retaliatory acts from members of the community, including his expulsion from the Village's main congregation and the expulsion of his children from the Village's official parochial schools. 3 R. 590-641. Therefore, the instant case presents a veritable risk that the public officials assuming office pursuant to the statute will not be able to discharge their public duties without regard to religious considerations.

In arguing that the common religious heritage shared by the Village residents should not preclude them from obtaining a separate school district, the petitioner Attorney General attempts to distinguish the decision of the United States Court of Appeals for the Second Circuit in *Parents' Assn. of P.S. 16 v. Quinones*, 803 F.2d 1235. There, the Second Circuit invalidated a plan by the New York City Board of Education to close off a section of a public school facility for exclusive use by Satmar students. Contrary to the representations of the Attorney General, the Second Circuit did not hold the plan unconstitutional "because it made too many accommodations" to Satmar religious tenets. (AG Brief at 18). Rather, the Second Circuit specifically ruled that the separation of Hasidic students from the general student population to oblige Satmar beliefs and practices prescribing separatism from those they consider undesirable constituted a prohibited establishment of religion. (803 F.2d 1238) (Counterstatement of the Case at 8-10). In so ruling, the Second Circuit observed that the need for the Satmarer to be separate was their belief that their children would be corrupted by non-Satmar students. "[They] want to be separate. It's intentional." 803 F.2d 1235 at 1238.

(4) Nature of Services Provided – Petitioners also maintain that Chapter 748 does not advance religion because it merely allows for the provision of "appropriate" secular services, (KJ Brief at 28; AG Brief at 16, 23), in an environment hospitable to the unique Satmar culture and traditions (AG Brief at 16; MW Brief at 7, 16). However, the need for an educational environment "receptive to the particular sensitivities and vulnerabilities" of the Village residents is inextricably linked to Satmar religious

traditions pursuant to which Village residents look to their schools as "a bastion against undesirable acculturation." (Resp. App. 17). Moreover, as petitioner KJVSD itself acknowledges, Village residents could have secured "appropriate" services from Monroe-Woodbury, by availing themselves of their statutory right to administrative and judicial review of any inappropriate decision affecting the education of their children. (KJ Brief at 28).

In this context, the argument that the statute's effect was to cut through any disputes concerning the appropriateness of services for Satmar children, and to "avoid child-by-child adversarial administrative proceedings" (KJ Brief at 28) is without legal foundation. Such an approach would violate both federal and state laws governing the education of children with disabilities which require that such children be educated pursuant to an "individualized education program" that addresses each child's distinctive disability and places the child in the least restrictive environment. (Counterstatement of the Case at 17-18). In addition, the suggestion that a wholesale approach is appropriate discounts the evidence submitted by Monroe-Woodbury in the *Board of Educ. of the Monroe-Woodbury CSD v. Wieder*, *supra*, "pointing to the progress made by Satmarer children who actually attended the public school programs" 72 NY2d 174, 181, and exceeds the alternative solution contemplated by the New York State Court of Appeals in that case.

Assertions that Chapter 748 does not impermissibly advance religion because the law merely provides for the rendition of services pursuant to "a general governmental program which distributes benefits neutrally" to qualifying children allegedly similar to those upheld in *Zobrest v. Catalina Foothills School Dist.*, ___ U.S. ___, 113 S.Ct. 2462

(1993) are also misguided. (MW Brief at 8). As all members of the New York Court of Appeals plurality expressed below, the creation of a school district for a religious community for the exclusive benefit of that group cannot be equated with the sign language interpreter in *Zobrest*. There, a student received a neutral benefit he was entitled to without regard to the sectarian-nonsectarian nature of the school he attended. (K.J. Pet. App. 14a; 24a; 32a). By contrast, the creation of the KJVSD is not "the fulfillment of an entitlement" (K.J. Pet. App. 32a) which is "in no way skewed towards religion" (K.J. Pet. App. 14a). Rather, it is an act of *de jure* segregation along religious lines designed to benefit one religious group. (K.J. Pet. App. 24a).

Similarly, the creation of a separate school district in and for the Village is unlike the provision of otherwise neutral services such as police and fire protection. (KJ Brief at 16). Police and firefighters render services "to a broad class of citizens defined without reference to religion." In contrast, the KJVSD, provides educational services exclusively to a religious community in an environment designed to conform with their religious preferences. (K.J. Pet. App. 13a-14a; 20a). In addition, the provision of police and fire protection might present constitutional problems in a situation where a particular religious community might ask government to conform the manner in which it renders such services to meet its religious needs or preferences. *See generally, Bowen v. Roy*, 476 U.S. 693 (1986). Claims that the KJVSD is open to all students, irrespective of race or creed, (KJ Brief at 20), begs the question as to why the KJVSD had to be established at all. Indeed, the legislation which was adopted to

"solve a religious problem" was clearly understood by the Legislature and Governor to provide the Satmar community with an exclusive facility in which their children, whose parents were not willing to send them into the heterogeneous Monroe-Woodbury Central Schools, could acquire such services in a homogeneous Satmar environment. (J.A. 19-20; 38-39; 40-42).

B. Chapter 748 Lacks a Secular Purpose.

Even though the New York Court of Appeals did not address the issue below, petitioners assert Chapter 748 survives scrutiny under the first prong of *Lemon* which examines the purpose behind contested governmental actions. Under this criterion, a statute will be deemed constitutionally infirm only if it is wholly motivated by an impermissible purpose. *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988), citing *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). Any alleged secular purpose must be sincere. *See, Edwards v. Aguillard*, 482 U.S. 578, 586 (1987) citing *Wallace v. Jaffree*, 472 U.S. 38, 64 (1985) (Powell, J., concurring); *Id.*, at 75 (O'Connor, J., concurring in judgment); *Stone v. Graham*, 449 U.S. 39 (1980); *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963). For the reasons set forth below, the statute's alleged secular purpose is a sham.

Petitioners contend Chapter 748 is not wholly motivated by an impermissible purpose because the statute sought "to end long years of strife and litigation" (AG Brief at 32-33) so as to ensure the delivery of special education services to the Satmar children of the Village (KJ Brief at 23-24; MW Brief 14-17). However, this argument is unavailing for several reasons. First, the long-

standing conflict referred to is directly linked to Satmar religious beliefs and traditions. (J.A. 19, 39). Second, Chapter 748 was designed to provide special education services already available from Monroe-Woodbury "within the Village so that the children would remain subject to the language, lifestyle and environment created by the community of Satmarer Hasidim and avoid mixing with children whose language, lifestyle and environment are not the product of that religion." (K.J. Pet. App. 67a; see, K.J. Pet. App. 30a-36a).

In addition, the KJVSD, although established for the alleged purpose of providing Village residents with special education available pursuant to both federal and state law, is incapable of providing its students with a "free appropriate public education" as defined under said laws. (J.A. 29-30, 84-93). Also, the type of school district created by the statute lacks authority to establish separate schools solely for students with disabilities. (J.A. 29). And, Chapter 748 contravenes New York State's Master Plan for School District Reorganization which, pursuant to New York State Education Law § 314, promotes the reorganization and consolidation of smaller school districts to encourage economy and efficiency in the State's public education system. (J.A. 81).

C. Chapter 748 Fosters Excessive Government Entanglement with Religion.

Having determined that Chapter 748 failed the second prong of *Lemon*, neither the New York Court of Appeals nor the intermediate appellate court found it

necessary to address whether the statute survived scrutiny under the third prong, which asks whether contested governmental acts foster excessive entanglement between church and state. On the other hand, the lower court determined it did because the statute requires the State Education Department, as the agency responsible for overseeing its implementation, to take special steps in its monitoring of the KJVSD "to ensure public funds are not expended to further religious purposes" (J.A. 100a). Indeed, the Governor in signing the statute into law envisioned the potential for entanglement when he warned that the KJVSD "must take pains to avoid conduct that violates the separation of church and state" (J.A. 41) and the Commissioner of Education has stated that "[his] staff in its monitoring capacity is unavoidably entangled in matters of religion" Affidavit of Hon. Thomas Sobol ¶ 12 (J.A. 78).

Petitioners argue to the contrary asserting there is no need for special monitoring because the KJVSD is a secular public school district with public employees rather than a sectarian school, the KJVSD board of education is an autonomous entity independent of the religious leadership overseeing the Village and its parochial schools, and no aid flows to a sectarian institution. These factors, they claim, avert the risk that KJVSD programs will not remain ideologically neutral and, consequently, the need for the type of monitoring which might be deemed constitutionally offensive. (KJ Brief at 35-36; AG Brief at 33-34; MW Brief at 31).

However, this argument belies the lower court's findings that "[t]he Village of Kiryas Joel and the coterminous school district is an enclave of segregated individuals

who share common religious beliefs which shape the social, political and familiar mores of their lives from cradle to grave." (K.J. Pet. App. 100a). "Labeling the Village as a 'union free school district' cannot alter reality." (K.J. Pet. App. 99a). See, *Waldman v. United Talmudic Academy*, 174 Misc.2d 529 (1990). Therefore, contrary to petitioners' assertions, special monitoring is necessary to ensure that KJVSD staff and programs remain ideologically neutral.

Moreover, monitoring of the KJVSD cannot be divorced from the historical circumstances which gave rise to its establishment, or from the nature of the powers conferred by Chapter 748. As a full-fledged union free school district, the KJVSD must not only provide special education services to its disabled student population, but it must also provide sundry other services, such as remedial instruction and transportation to the children attending the Village's private parochial schools. The constitutional problems inherent in providing these services to Satmar parochial school students have already been the subject of judicial adjudications adverse to the Satmar community. See, *Bollenbach v. Board of Educ. of the Monroe-Woodbury Central School Dist.*, 659 F.Supp. 1450 (SDNY 1987); *Parents' Assn. of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986). Thus, special monitoring is necessary to ensure the KJVSD does not intentionally or unwittingly circumvent the parameters of those decisions. Affidavit of Hon. Thomas Sobol, at ¶ 12 (J.A. 78-79).

For the reasons set forth above, Chapter 748 fails all three prongs of the *Lemon* test and thus violates the Establishment Clause.

If indeed this Court reverses the decision below the relief which will be provided will be in contravention to the fundamental principles of the Establishment Clause. Respondents respectfully request that, in its decision, this Court consider the observation of the lower court that "the Satmar Hasidic sect enjoys religious freedom as guaranteed by the First Amendment that they are now seeking to circumvent. This short range accomplishment could in the long run, jeopardize the very religious freedom that they now enjoy." (K.J. Pet. App. 101a).

Petitioner Attorney General urges this Court to view this legislation as no more than a "negotiated settlement." (AG Brief 23-24). However, the fact that the KJVSD and Monroe-Woodbury might be pleased with the outcome effected by Chapter 748 does not make it constitutionally sound. The Constitution does not permit government to demonstrate its respect for religious diversity by segregating the nation's citizenry along religious lines. A reversal of the lower court's decision would convey a message to the contrary, in contravention of the intent of this nation's founding fathers.

CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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February 1994

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Nos. 93-517, 93-527 and 93-539

OFFICE OF THE CLERK

In the Supreme Court of the United States**OCTOBER TERM, 1993**

BOARD OF EDUCATION OF THE KIRYAS JOEL
VILLAGE SCHOOL DISTRICT, BOARD OF EDUCATION
OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT
and ATTORNEY GENERAL OF THE STATE OF NEW YORK,

*Petitioners,**-against-*

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE STATE OF NEW YORK**

**REPLY BRIEF FOR PETITIONER
BOARD OF EDUCATION OF THE MONROE-WOODBURY
CENTRAL SCHOOL DISTRICT**

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ARGUMENT

POINT I

THE STATUTE WHICH CREATES THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT DOES NOT ON ITS FACE VEST DISCRETIONARY GOVERNMENTAL POWERS IN ANY RELIGIOUS INSTITUTION

Respondents and their *amici* argue that the statute which creates the Kiryas Joel Village School District contravenes the holding of this Court in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982), which instructs that governmental powers may not be "delegated to or shared with religious institutions". Additionally, they contend that the resulting fusion of civil and religious powers is perceived as an endorsement of the separatist principles of the Satmarer, thereby violating the "primary effect" prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). We respectfully submit that their analysis is flawed to the extent that they fail to distinguish between the acts of religious individuals and the acts of religious institutions.

A statutory delegation of civil power to the residents of an established political community which enables them to organize and conduct the affairs of government is very different from the delegation of civil authority to religious institutions within the community itself. The statute at issue herein is neutral with respect to religion and does not vest any discretionary governmental powers in any religious institution within the Incorporated Village of Kiryas Joel. Rather, in the best tradition of representative

democracy, it recognizes the right of those citizens most directly affected to local control and governance over the schools which their children attend.

In New York State and perhaps in most other jurisdictions within the nation, school board members are popularly-elected by residents whose children attend the schools within the community. In this respect, the election provisions in the statute creating the Kiryas Joel Village School District are hardly unique or worthy of note. Temporal authority is vested in a public school board consisting of seven trustees "elected by the qualified voters of the Village of Kiryas Joel" (Chapter 748 of the Laws of 1989, § 2). The Board "ha[s] and enjoy[s] all the powers and duties of a union free school district under the provisions of the education law" (Chapter 748 of the Laws of 1989, § 1). This, too, is consistent with New York's statutory scheme for smaller school districts.

Respondents and their *amici* advance the false syllogism that because all of the residents of the Village are Satmarer Hasids and because the residents elect the trustees of the school district, therefore the Village Rabbi or rabbinical authorities will *ipse dixit* control the secular activities of the Village School District. Other than the assertion that the Grand Rabbi expressed his personal preference from amongst the various candidates for school board office (undoubtedly a protected First Amendment right), there is absolutely no evidence in the Record below that rabbinical authorities have attempted to exercise any secular influence or control over the day-to-day operation of the Village School District. In any event, such an argument could be maintained within the context of an "as applied" challenge, but petitioners

herein only attack the facial constitutionality of the statute.

There are numerous political subdivisions in this country and more particularly in the State of New York where by reason of chance, geography or freedom of association, the great majority of inhabitants may share a common religious identification. Respondents would have this Court draw the presumption (for there are no facts to support it in the instant case) that where this occurs, the dominant religious group within such community will necessarily control the exercise of discretionary governmental functions of the political subdivision and thus impermissibly advance the religious interests of that denomination.

In *Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989), cert. den., 494 U.S. 1081 (1990), the Court of Appeals for the Eighth Circuit rejected the premise that school board members would not be capable of separating their religious beliefs from their civic obligations. The Court noted that "elected government officials are [not] required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the controlling *Lemon* standard." (*Id.* at 380.)

Similarly, in *McDaniel v. Paty*, 435 U.S. 618, 629 (1978), this Court struck down a statute which disqualified ministers from seeking civic office as an unconstitutional burden upon their right to free exercise. The Court noted that "the American experience provides no persuasive support for the fear that clergymen in political office will be less faithful to

their oaths of civil office than their unordained counterparts". In this case, respondents would have this Court extend the unconstitutional burden to laymen having deep religious convictions, based upon the bald assertion that such individuals will be unable to separate their religious from their civic obligations.

The statute creating the Kiryas Joel Village School District does not on its face cede governmental responsibilities to the religious authorities of the Village of Kiryas Joel, nor does it conjoin political and religious functions in any religious institution. If the essence of respondents' constitutional objection is that the Satmarer will be in a position to make secular educational decisions in connection with educational programs affecting their own disabled students, how does this differ from governance in those other school districts where the great majority of inhabitants share a common religious heritage? In such instances, what percentage is the disqualifier? Would the statute be constitutional if eighty (80%) percent of the residents were Satmarer?

The statute is religion-neutral on its face. It vests civil authority in a community consisting of religious individuals but not in its religious institutions. The statute does not advance the religious precepts of such institutions in other than an incidental or indirect manner. Thus, the statute is constitutional in all respects.

Amici Committee for The Well-Being of Kiryas Joel and National Coalition for National Public Education and Religious Liberty have filed "lodgings" with this Court containing various rabbinical

proclamations and newspaper articles concerning alleged restrictions upon alienation of property within the Village. We respectfully submit that the contents of such lodgings are manifestly inappropriate and ask that they be stricken. In Stern, Gressman, Shapiro & Geller, Supreme Court Practice (7th ed., 1993), the authors note the impropriety of submitting "additional or different evidence that is not part of the certified record, such as an affidavit or an unsworn statement". (*Id.*, at 555.) While any attorney may "lodge" documents with the Court, such information must be of such a nature that the "Justices could take judicial notice of and refer to in their opinions as generally known facts" (*Id.*, at 556).

The documents contained in the various lodgings are clearly not the appropriate subject for judicial notice. They merely represent the private actions of certain individuals which lack the force and effect of law. What distinguishes a law from other pronouncements is that it "must be obeyed and followed by citizens subject to sanctions or legal consequences" (Black's Law Dictionary, 6th ed.). A law must have a binding legal force (*United States Fidelity and Guarantee Co. v. Guenther*, 281 U.S. 34, 37 [1930]). Assuming *arguendo* but not conceding the accuracy of the contents of such materials, any resident of the Village of Kiryas Joel is free to sell or rent his or her property as he or she sees fit. The proclamations are legally unenforceable, having only such force or effect, if any, as any resident may choose to impart to them. There can be no doubt, however, but that federal and state civil rights laws and fair housing laws would prevail over any attempt to enforce the proclamations. They have no greater effect than a religious tenet which requires believers to tithe for

the benefit of their church. An individual may comply or not, as his or her conscience dictates.

Various *amici* attempt to draw parallels between the Village of Kiryas Joel and the municipalities before the courts in *Oregon v. Rajneeshpuram*, 598 F. Supp. 1208 (D. Oregon, 1984) and *State of New Jersey v. Celmer*, 80 N.J. 405, 404 A.2d 1 (1979). In the latter cases, the Courts found a close and impermissible interrelationship between the religious organizations and civil governance, where the religious organizations owned all of the property within the political subdivision and thus determined who could and could not reside therein and where religious authorities actually exercised governmental powers. Whatever informal restrictions, if any, exist upon alienation of real property within the Village of Kiryas Joel are clearly unenforceable, because no legal sanction exists for their violation. Consequently, residents are free to dispose of their property as they see fit, for unlike *Rajneeshpuram* and *Celmer*, *supra*, there are in fact no restrictive covenants on such property or any other legal limitations upon who may or may not reside within the Village or upon how real property, including leaseholds, may be conveyed.

It should be noted that in *Oregon v. Rajneeshpuram*, *supra*, the Court specifically distinguished between instances in which the land within the political subdivision was communally-owned from those situations where the property belonged to private landowners, noting that "[t]he provision of services by a municipal government in a city whose residents are private landowners of one religious faith has the direct and primary effect of aiding the individual landowners and residents living in the

city. The effect on the religion of those private owners is remote, indirect and incidental."

The essence of local control is the vesting of civil authority in those individuals most directly affected thereby. Disqualification of a community consisting of individuals having deep religious convictions from this essential feature of representative democracy would constitute hostility to religion rather than neutrality to it and would place an unconstitutional burden on the free exercise rights of such individuals.

POINT II.

CHAPTER 748 OF THE LAWS OF 1989 DOES NOT EFFECT AN IMPERMISSIBLE DENOMINATIONAL PREFERENCE

This Court in *Larson v. Valente*, 456 U.S. 228, 252 (1982), has held that the various components of the *Lemon* test were "intended to apply to laws affording a uniform benefit to all religions and not to provisions ... that discriminate among religions". In the latter instance, this Court has stated that it will apply an Equal Protection "strict scrutiny" standard to determine whether the governmental action is "closely fitted to the furtherance of any governmental interest" (*Id.*, at 255). Respondents and various of their *amici* argue that Chapter 748 of the Laws of 1989 creates a denominational preference to the extent that it extends a benefit solely to the Satmarer Hasidim. Consequently, they argue, *Larson*, rather than *Lemon*, states the applicable constitutional standard.

The Minnesota statute before the Court in *Larson, supra*, exempted from state registration requirements those religious organizations which solicited more than fifty (50%) percent of their funds from non-members. Such a scheme, this Court noted, which "effect[ed] the selective legislative imposition of burdens and advantages upon particular religious denominations" (*Id.*, at 255), had established "precisely the sort of official denominational preference that the Framers of the First Amendment forbade" (*Id.*).

The holding of this Court in *Larson, supra*, is clearly inapposite. Chapter 748 of the Laws of 1989 does not create a denominational preference for the Satmarer Hasidim or for any religious denomination. The statute is on its face neutral with respect to religion and merely creates a school district coterminous with the boundaries of an existing governmental entity. Thus, *Larson*, which applied a strict scrutiny standard to "statute[s] or practice[s] patently discriminatory on [their] face" (*Lynch v. Donnelly*, 465 U.S. 668, 687, n. 13 [1984]), is clearly inapplicable.

Petitioner in its brief on the merits urged this Court to recognize that the creation of the Kiryas Joel Village School District does not have the primary effect of advancing the religious precepts of the disabled Satmarer Hasidic students. Rather, it facilitates their access to secular educational programs offered without regard to religion, upon terms and conditions which in some instances were inimical to the basic precepts of the Satmarer. The School itself has no religious mission. The benefits which the disabled students receive at the Kiryas Joel Village School District are coextensive with and certainly no

greater than those afforded other disabled students throughout the State. In fact, they are precisely the type of services offered to all disabled students as part of a special education program which "distributes benefits neutrally to any child qualifying as 'handicapped' under the I.D.E.A., without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends" (*Zobrest v. Catalina Foothills District*, U.S. ___, 113 S. Ct. 2462, 2467 [1993]).

Furthermore, *Wolman v. Walter*, 433 U.S. 229 (1977), instructs the religious homogeneity of the student body is not constitutionally impermissible, because the constitutional violation arises from the nature of a recipient institution, "not from the nature of the pupils" (*Id.*, at 248). The "neutral site" cases preclude the argument that the Kiryas Joel Village School District is unconstitutional despite its public nature merely because it serves the secular needs of students with a common religious heritage.

Since the legislation establishing the Kiryas Joel Village School District does not advance the religious precepts of the Satmarer, the statute cannot by definition create a denominational preference in favor of such sect. No religious group is impermissibly favored or preferred; rather, the disabled students of the Village are afforded access to programs and services to which all disabled students are entitled but within the context of a secular learning environment which is not perceived by them as hostile or inhospitable to their particular culture and traditions.

Significantly, the New York Court of Appeals clearly did not perceive the statute at issue to effect a

denominational preference, thus calling for strict scrutiny under *Larson, supra*. It determined the case, we submit incorrectly, solely by reference to the application of the second prong of *Lemon, supra*. Only Judge Kaye in her concurring opinion indicated that she would have decided the case by reference to the principles articulated in *Larson, supra*.

The statute does not effect a denominational preference. It is neutral with respect to religion and does not have a primary effect of advancing the religious precepts of the Satmarer. Thus, application of a constitutional standard requiring strict scrutiny is inappropriate.

POINT III.

THE STATUTE REFLECTS A VALID PERMISSIVE ACCOMMODATION UNDER THE FIRST AMENDMENT

This Court in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 890 (1990), recently endorsed the principle that it was permissible under the Establishment Clause for government to enact "nondiscriminatory religious-practice exemption[s]" in instances where the granting of such exemptions was not compelled by the Free Exercise Clause. While *Smith, supra*, generally restricted the availability of constitutionally-compelled accommodations on religious grounds from "valid and neutral law[s] of general applicability" (*Id.*, at 879), the decision recognizes that even in the absence of any constitutional basis for asserting a claim to an exemption where religious freedom is burdened by operation of a law of general

applicability, a legislature might nevertheless be solicitous of protecting religious belief through permissive accommodations in particular instances.

Indeed, Congress itself in the Religious Freedom Restoration Act of 1993, Public Law 103-141, 107 Stat. 1488 (1993), has replaced the accommodations previously available under the Constitution itself through the "compelling state interest" test articulated in *Sherbert v. Verner*, 374 U.S. 398 (1963), with statutory exemptions, (accommodations), in instances where "[g]overnment ... substantially burden[s] a person's exercise of religion even if the burden results from a rule of general applicability ... [unless government can establish that] the application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest" (R.F.R.A., §§ 3[a] and [b]). Clearly, Congress believed that there was sufficient room in the joints between the Establishment Clause and the Free Exercise Clause to structure statutory, non-discriminatory religious practice exemptions to relieve individuals from burdens upon free exercise absent a compelling government interest and the use of least restrictive means to address such interest.

Respondents and their *amici* suggest that an accommodation which enables the disabled Satmarer students to receive secular special education services at the religiously-neutral Kiryas Joel Village School by its very nature advances the religious precepts of such students and thus violates the second prong of *Lemon, supra*. This contention disregards two basic realities. First, the accommodation structured by the

statute was intended to address *nonreligious* reasons asserted by the Satmarer why their disabled students should not be compelled to attend the public schools of the Monroe-Woodbury Central School District, "most particularly because of the emotional impact on the children of travelling out of Kiryas Joel" (*Board of Education of the Monroe-Woodbury Central School District v. Wieder*, 72 N.Y.2d 177 [1988]). Secondly, the statute creates a secular learning environment through use of public employees at a site "not physically or educationally identifiable with the functions of a non-public school" (*Wolman v. Walter*, 433 U.S. 229 [1977]), and thus does not have the primary effect of advancing the religious precepts of the disabled Satmarer students.

Petitioner Board of Education of the Kiryas Joel Village School District in Petition Number 93-517 argues that separatism is not a religious tenet of the Satmarer. In support thereof, it points to various instances in which Satmar parents have for limited periods of time sent their children to public school programs. Petitioner Board of Education of the Monroe-Woodbury Central School District is clearly not in the position to evaluate the basic tenets of the Satmarer to determine whether their desire for separation is doctrinal rather than cultural. Petitioner, however, is familiar with the litigating position of the Satmarer in the *Wieder* case, *supra*, and recognizes, as did the Court of Appeals in its prior decision, that the reasons ascribed by the Satmarer for such separation were *nonreligious*.

Even were this Court to conclude that religious factors predominated in the refusal of the Satmarer to send their disabled students to the programs and

services offered by the Monroe-Woodbury Central School District, nevertheless this Court should regard the statute creating the Kiryas Joel Village School District as a permissive legislative accommodation designed to alleviate a burden upon their religious practice. Justice O'Connor in *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985), recognized that a government might grant an exemption to religious observers though not compelled to do so by the Free Exercise Clause. In such instances, she suggested that it was "disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden". "A rigid application of *Lemon* would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion". (*Id.*, at 82.)

In *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), this Court in Footnote 59 acknowledged that the "scope of accommodations permissible under the Establishment Clause is larger than the scope of accommodations mandated by the Free Exercise Clause". Similarly, in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987), this Court again restated that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions". That such an accommodation by its nature may allow a religious institution to advance its own ends does not bring the statute into conflict with the second prong of *Lemon*, *supra*. "A law is not unconstitutional simply because it allows

churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion *through its own activities and influence*" (*Id.*, at 337; emphasis supplied).

To the same effect is this Court's decision in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 (1989), wherein the Court in Footnote 8 of the plurality opinion restated the proposition that not all benefits conferred exclusively upon religious groups on account of their beliefs were precluded by the Establishment Clause unless mandated by the Free Exercise Clause. A government may enact policies having a secular objective which have the effect of providing an incidental benefit to religious groups, where the government acts to relieve a religious individual of a "significant state-imposed deterrent to free exercise of religion" (*Id.*, at 14) in a manner which does not burden nonbeneficiaries markedly. See, also, the dissenting opinion of Justice Ginsburg from denial of a suggestion to hear the case *en banc* in *Goldman v. Secretary of Defense*, 739 F.2d 657, 660 (D.C. Cir., 1984).

Respondents contend that the permissive accommodation doctrine is inapplicable because co-petitioner Kiryas Joel Village School District has failed to "articulate the religious belief or practice infringed upon, the nature of the burden allegedly lifted by the statute and the particular circumstance through which government had imposed any such burden on the residents of Kiryas Joel" (Respondents' Brief at p. 27). Co-petitioner Kiryas Joel Village School District's unwillingness to ascribe a religious motivation for

its desire to separate its disabled students from a mainstream educational setting is understandable, since its position has consistently been that the necessity to separate its students arises from the Community's cultural, nonreligious desire to shelter its students from worldly, modern influences which would subvert the values which the Community holds to be central to its faith. This Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), acknowledged the propriety of an accommodation, in that instance compelled by the Free Exercise Clause, exempting the Old Order Amish from those aspects of the state's compulsory attendance law which threatened continued existence and physical survival of the community by subjecting its students to worldly, modern influences of the public schools, whose values were by their very nature inconsistent with and inimical to the insular traditional values of the Amish.

If this Court were to accept the premise that there were legitimate secular, nonreligious reasons for the enactment of the statute, further discussion with respect to the appropriateness of the religious practice exemption would be unnecessary. However, even if this Court were to find a religious basis for the desired separatism, there most certainly exists a significant government-imposed burden on the free exercise rights of the Satmarer. That burden lies in the discretionary authority vested in the Committee on Special Education of the Monroe-Woodbury Central School District under state and federal law to determine, at least in the first instance, where and how to serve the needs of the Satmarer disabled students.

Respondents advance inconsistent positions on the appropriateness of the accommodation. They argue first that the rationale for separatism is religious, to which petitioners respond that it is secular and arises from the culture and traditions of the Satmarer. When petitioners, deferring solely for purposes of argument, acknowledge the difficulty of separating the traditions from underlying religious practices, respondents then argue sophistically that petitioners have failed to identify which specific religious tenet is burdened by compelling the disabled students to receive instruction in the regular classes of the Monroe-Woodbury Public Schools.

In *Board of Education of the Monroe-Woodbury Central School District v. Wieder*, 72 N.Y.2d 174 (1988), the New York Court of Appeals rejected the Board's position that it could serve the needs of disabled Satmar students only within the regular classes of the public schools, just as it similarly rejected the Satmarers' position that the Board should be compelled to provide programs and services to their children separately but proximate to the nonpublic schools which such children attended. The Court held that the Monroe-Woodbury Board of Education was "neither compelled to make services available to private school handicapped children only in regular public school classes and programs, nor without authority to provide otherwise". (*Id.*, at 187.)

It is the exercise of judgment and discretion by the Committee on Special Education of the Monroe-Woodbury Central School District pursuant to federal and state law with respect to the manner in

which it chooses to serve the needs of their children which burdens the right of the Satmarer parents to secure programs and services for their disabled children in a manner perceived by them to be consistent with their culture and traditions. This government-imposed burden reflects Monroe-Woodbury's implementation of the doctrine of "least restrictive environment", which requires that its Committee on Special Education meet the needs of the disabled Satmarer within the regular classes of the public schools to the maximum extent consistent with their special needs, a choice which the Committee felt was compelled upon them by Title 20 U.S.C. §§ 1412 (5) (B) and 1414 (a) (1) (C) (iv) and its implementing regulations (Title 34 C.F.R. § 300.550 [b] [1] and [2]; § 300.552 [b] and [c]; and § 300.553), and also pursuant to New York Education Law, § 4402 (2) (a), its state law counterpart. The Committee thus declined to explore the suggestion of the Court of Appeals in *Wieder, supra*, that "certain of the services in controversy could be furnished to defendants at neutral sites if plaintiff determined to do so" (*Id.*, at 189, Footnote 3), because the Committee perceived such an approach to be incompatible with the Congressional mandate to educate students within the "least restrictive environment", *i.e.*, a public school setting.

In fulfillment of its statutory obligation, the Monroe-Woodbury Central School District need merely provide programs and services in an *appropriate* manner (Title 20 U.S.C. § 1413 [a] [2]; Title 34 C.F.R. § 300.1 [a]). If the particular program which the Committee on Special Education selects to serve the needs of a disabled child meets the standard of "appropriateness", the parent must then make a

conscious decision to accept the proffered program or to decline it. The judgment and discretion vested by law in the Monroe-Woodbury Committee on Special Education, coupled with its stated intention to secure the least restrictive environment (which in most cases will be a public school setting), effectively inhibits Satmarer parents from accepting programs and services for their children, thereby depriving them as a practical matter of the services which their disabled students desperately need.

A second government-imposed burden which can be identified is the traditional organizational structure under state law of the heterogeneous public school, to which the disabled Satmarer student brings a special vulnerability. The student is set apart immediately from his or her peers by culture, religion, language and manner of dress. Thus, it is simplistic to suggest, as does *amicus* Americans United for Separation of Church and State, that any burden arises from mere private conduct of insensitive non-Hasidic school children, rather than from governmental action.

We respectfully submit that the State of New York did not through its enactment of legislation creating a public school district coterminous with the boundaries of an existing incorporated village, advance the religion of the Satmarer. A permissible accommodation, suggests Professor McConnell¹, "merely removes obstacles to the exercise of religious conviction adopted for reasons independent of the government's action". The statute establishing the

¹ McConnell, Accommodation of Religion: An Update and Response to the Critics, 60 Geo. Wash. L. Rev. 685, 686 (1992).

Kiryas Joel Village School District does not induce or favor the exercise of religion and is religion-neutral on its face. It lifts a burden on free exercise rights which enables the Satmarer to participate in public programs which provide secular educational services to the disabled, without regard to religion or the schools which such students attend. In fact, the services which the disabled Satmarer receive in the Village School are precisely those which are generally available to other disabled students. Furthermore, the effect of the statute and the accommodation effected thereunder upon nonbeneficiaries is minimal (Cf. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 [1989]).

Assuming *arguendo* this Court finds a religious underpinning to the Satmarers' demand for secular instructional services at a neutral site, this Court should nevertheless sustain the constitutionality of the statute as a valid permissive legislative accommodation which neither prefers nor advances the religious beliefs of the Satmarer, does not coerce third parties or place official pressure upon them to conform to religious practices and has very limited effect upon nonbeneficiaries. The constitutionality of the statute should be sustained.

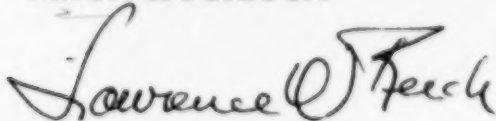
CONCLUSION

For the foregoing reasons, the appeal should be granted, and an order of remittitur should be entered directing the Court of Appeals of the State of New York to enter judgment declaring the facial constitutionality of Chapter 748 of the Laws of 1989 of the State of New York.

Dated: Northport, New York
March 16, 1994

Respectfully submitted,

INGERMAN, SMITH, GREENBERG,
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A handwritten signature in cursive script, appearing to read "Lawrence W. Reich".

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE
KRYAS JOEL VILLAGE SCHOOL DISTRICT, et al.

—v.—

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

**BRIEF FOR THE NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS ("COLPA"),
AS AMICUS CURIAE, IN SUPPORT OF PETITIONERS**

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

BOARD OF EDUCATION OF THE
KIRYAS JOEL VILLAGE
SCHOOL DISTRICT, *et. al.*

Petitioners,

v.

LOUIS GRUMET and ALBERT W. HAWK

Respondents.

ON WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

BRIEF FOR THE NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS ("COLPA"), AS
AMICUS CURIAE, IN SUPPORT OF PETITIONERS

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

This case raises the question of whether almost 200 severely disabled children are to be deprived of special education authorized by a duly elected public school district board and provided in a public school by public school teachers employing standard curricula solely because the area encompassed by the school district is populated by citizens who share a common religious faith. A majority of the court below held that because the school district was coterminous with an area populated by members of one religious group, the law establishing the district created the kind of "symbolic union of church and state" prohibited by the "primary effect" prong of the *Lemon v. Kurtzman*, 403 U.S. 602 (1971), test. *Louis Grumet et. al. v. Board of Ed. of the Kiryas Joel Village School Dist.*, 81 N.Y.2d 518. The court made no factual finding that the students at the school were exposed to any religious indoctrination.

Amici believe that this case presents a clear example of the infirmities of the *Lemon* test and offers the Court an opportunity to refashion its approach to Establishment Clause jurisprudence. As this case makes clear, *Lemon* is inadequate to the task of helpfully guiding the relationship between religion and state in our nation.

The National Jewish Commission on Law and Public Affairs ("COLPA") is a non-profit association of volunteer attorneys and social scientists who donate their services for public advocacy on behalf of the Orthodox Jewish community. COLPA has filed briefs on the merits in most of the important religious liberty cases considered by the Court over the past twenty years. See, e.g., *Walz v. Tax Comm'n of*

the City of New York, 397 U.S. 664 (1970); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Cmte. for Public Educ. v. Nyquist*, 413 U.S. 756 (1973); *TWA v. Hardison*, 432 U.S. 63 (1977); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Mueller v. Allen*, 463 U.S. 388 (1983); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Lee v. Weisman*, 112 S.Ct. 2649 (1992); *Zobrest v. Catalina Foothills School Dist.*, 113 S.Ct. 2462 (1993).

This brief is joined by national organizations of Orthodox Jewish rabbis and scholars, as well as synagogues and social service organizations which represent a broad spectrum of the Orthodox Jewish community in the United States. One of the joining groups is the **Union of Orthodox Jewish Congregations of America** ("Orthodox Union"), a coordinating body for approximately 1,000 Jewish congregations in the United States.

The other groups joining in this brief are:

Amit Women; the largest women's zionist organization in the United States. Their 80,000 strong membership sponsors a network of education and welfare projects across the country.

Agudath Harabonim of the United States and Canada; the oldest Orthodox rabbinical organization in the United States, whose membership includes leading scholars and sages. It is intimately involved with educational, social, and legal issues significant to the Jewish community.

Emunah of America; a religious zionist organization comprised of 40,000 members who sponsor education and welfare projects for the needy.

National Council of Young Israel; a coordinating body for more than ~~300~~ Orthodox synagogue branches in the United States and Israel. It is involved in matters of social and legal significance to the Orthodox Jewish community.

Rabbinical Alliance of America; An Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been actively involved in a variety of religious, social, and educational areas affecting Orthodox Jews.

Rabbinical Council of America; The largest Orthodox Jewish rabbinical organization in the world with a membership in excess 1,000. It is deeply involved in issues related to religious freedom.

Torah Umesorah; The National Society for Hebrew Day Schools is the coordinating body for more than 600 Jewish Day Schools across the United States.

We are supporting the petitioners in this case because we believe that the Court of Appeals' use of the Establishment Clause to strike down the provision of secular benefits in a secular manner to a community because its members share a common religious faith is an undermining of religious liberty and is at odds with the language, history, policies, and sound judicial understanding of the First Amendment of our Constitution.

SUMMARY OF ARGUMENT

1. The Court should use this case as the means for overruling the unhelpful and much criticized three prong test elaborated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon* test has proven to be ambiguous and unhelpful to lower courts and legislatures in their attempts to negotiate the relationship between the state and religion. Furthermore, *Lemon's* test does not serve the primary goal of the Constitution's religion clauses; the promotion of religious liberty. Rather, *Lemon* has turned the First Amendment on its head and made it a tool for the protection of the secular state. Such an approach does not conform with the goals the Framers sought in crafting the religion clauses, nor does it conform to the political history of our nation. Moreover, it does not serve the contemporary pluralistic society in which we live. Most of the members of the Court have thoroughly criticized *Lemon* in past decisions and several members have offered alternative approaches to dealing with church and state issues. We suggest that the Court adopt an approach that takes into account both religion clauses of the First Amendment and reads them as a coherent whole. Such an approach would view the Free Exercise Clause as a mandate for government accommodation of religious citizens when their practice would be otherwise burdened by the state. The Establishment Clause would be understood to set the limits on optional accommodation programs enacted by the state. In a case such as the one before the Court, the provision of a secular benefit to the religious community of Kiryas Joel would be viewed as a legitimate optional accommodation of religion, even if it were to somehow have failed the *Lemon* test, since it could not be perceived as endorsement of the Satmar faith by New York State. Such

application of the unified approach would properly serve the goal of the First Amendment; the promotion of religious liberty.

2. Should the Court retain the three prong *Lemon* test, Chapter 748 should still not be found an improper establishment of religion in violation of the First Amendment. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), requires that for a statute to pass muster under the Establishment Clause it must have a secular purpose, must not have the primary effect of advancing or inhibiting religion, and must not excessively entangle government and religion. Chapter 748 meets each of these requirements. The creation of the Kiryas Joel School District was in order to provide the secular need of secular special education for handicapped children. Chapter 748 does not have the primary effect of advancing religion; it does not, as the New York Court of Appeals suggested, serve to endorse the Satmar Hasidic faith by accommodating that community with the provision of education for their children. Lastly, there is no entanglement of religion and state in the implementation of the Kiryas Joel School District. The school is a public school offering secular education and part of the education system of New York State. It is not designed in any way to offer religious instruction and, therefore, does not require government monitoring of any sort. In finding Chapter 748 a violation of the Establishment Clause for the sole reason that the members of the Kiryas Joel community share a common religious faith is to impermissibly make their religious faith the basis of their standing in our political community. *See, Lynch v. Donnelly*, 465 U.S. 668, 687 (1984)(O'Connor, J., concurring); *Employment Div. v. Smith*, 110 S.Ct. 1595, 1599 (1990).

ARGUMENT

I. LEMON AND THE "PRIMARY EFFECT" TEST SHOULD BE OVERRULED AND REPLACED WITH A STANDARD THAT PERMITS GOVERNMENTAL PROVISION OF SECULAR NEEDS OF RELIGIOUS CITIZENS AND COMMUNITIES.

"The Establishment Clause [and similar state provisions] are broad charters of liberty, which embody in fundamental law the most basic assumptions of the secular democratic order."¹ These are the words of the proponents of retaining the three part test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and attempting to build a wall of separation between church and state which is high and thick. Such statements, however, and their underlying assumptions do not properly reflect the goals and principles of our Constitution's first concern; religious liberty.

Respondents and their *amici* argue for a secular democratic order, one in which any trace of religion or religious rhetoric is declared unacceptable, even, politically incorrect. This is clearly not reflective of our nation's constitutional life from its inception by our Founders to modern times. At the birth of our republic James Madison wrote his *Memorial and Remonstrance*. In this work he argued vigorously for the principle of religious liberty, but in doing so he sought to protect the church from the state, not vice versa, and in doing so he offered religious arguments. He wrote: "If

1. Brief Amicus Curiae of The American Jewish Congress in Support of Appellees submitted to the New York Court of Appeals, at 10, emphasis supplied.

this freedom [to observe religion or not] be abused, it is an offence against God, not against man." J. Madison, *Memorial and Remonstrance Against Religious Assessments* (1785). The abolitionist movement was grounded in religious moral principles and rhetoric. Similarly, we can remember our nation's civil rights movement; led by clergy and invoking religious morality at every turn. A secular democratic order and its attendant attitude advocated by Respondents would have us spurn this nation's greatest accomplishments in its effort to secure liberty and equality for all its citizens.

Over the past decade scholars have convincingly demonstrated that the assumption that our constitutional Founders sought to create a totally secular society bereft of any and all influence by religious citizens and virtually hostile to the needs of those citizens to be simply incorrect. See, e.g., Akhil Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1159 (1991); Harold Berman, *The Religion Clauses of the First Amendment in Historical Perspective*, in *Religion and Politics*, (W. Lawson Taitte, ed., 1989); Phillip Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L.Rev. 839 (1986); Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986).

An examination of the Founders' statements at the time reveals that the First Amendment prohibitions were directed at Congress, not the states, and proscribed making any law "respecting an establishment of religion." The term "respecting," taken in its historical context, clearly suggests the purpose of the clause was to prevent the Congress from interfering with the state establishments of religion. Indeed, scholars have argued that the principal purpose of the

Establishment Clause was to protect state religious establishments from federal government disestablishment. See, Amar, *supra*; A. Adams and C. Emmerich, *A Nation Dedicated to Religious Liberty* (1990), at 46.

Of course, the political and legal character of our nation has changed since the founding era. The Bill of Rights, including the religion clauses, properly apply to the states. The society of our Founders was religiously and culturally homogeneous compared to contemporary America. The American people have come to embrace the concept of religious pluralism in a way our forefathers could not have imagined. Furthermore, it can be fairly argued that attitudes have changed within our religious communities. Members of religious communities in contemporary America are not robots commanded by their clerics and serving as their tools in the political discourse. Catholics who consider themselves devout members of their order, yet differ with their church on the issue of abortion are but one famous illustration of this phenomenon. Combining the principles of our Founders with the realities of our society can, then, yield a useful middle ground. While we should not return to the notion that states may establish religion, we ought to read the Establishment Clause to permit "government support of theistic and deistic belief [communities] more nearly comparable to the government support which is permitted to be given to agnostic and atheist [communities]." Berman, *supra*, at 72. As applied to the case now before the Court, such an understanding would easily allow the disabled children of Kiryas Joel to have their school and not be penalized for their religious faith.

Recently, Professor Stephen Carter of Yale Law School laid out a comprehensive and compelling analysis of the

religion clauses, their history and interpretation, and their role in our societal life to date in *The Culture of Disbelief*. S. Carter, *The Culture of Disbelief* (1993). His argument, and the argument with which we identify, is that "the principal task of the separation of church and state is to secure religious liberty," and that the "transformation of the Establishment Clause from a guardian of religious liberty into a guarantor of public secularism raises prospects at once dismal and dreadful." *Culture of Disbelief*, at 107 and 122.

Lemon has turned the Establishment Clause on its head. Consider its elements: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.'" *Lemon*, at 612. Thus conceived, the clause exists more for the benefit of secular politics than religious liberty; it attempts to erect a wall of separation to protect the political order and its institutions. Countless illustrations have been offered to demonstrate that *Lemon* is unhelpful in resolving Establishment questions. "Did legislation enacted at the behest of the religiously motivated civil rights movement have a secular purpose? If granting tax relief to parents whose children attend parochial schools advances religion by making the schools cheaper, does refusing to grant them inhibit religion by making them more expensive? If competing factions within the same church both seek to control of the same church building, does judicial resolution represent an excessive entanglement?" *Culture of Disbelief*, at 110. Each of these questions and more demonstrate that *Lemon* has come to be more of a hindrance than a help to our courts and our citizens in negotiating the relationship between governments and churches.

But there is more. The quiet statements of the scholarly critiques of the Court's Establishment Clause jurisprudence are mere whispers in comparison to the numerous and varied proclamations against *Lemon* and its progeny made by virtually each member of the Court at one time or another. As noted by Justice Scalia last term: "Over the years, no fewer than five of the [then] sitting Justices have, in their own opinions [criticized *Lemon*] and a sixth has joined in doing so." *See, Lamb's Chapel v. Center Moriches U.F.S.D.*, 113 S.Ct. 2141, 2150 (1993). To recall but a few specific examples: In 1985 Justice O'Connor noted "difficulties inherent in the Court's use of the test articulated in *Lemon*..." *Corp. of Presiding Bishop v. Amos*, *supra* at 346; and in 1989 Justice Kennedy recognized that "[s]ubstantial revision of our Establishment Clause doctrine may be in order." *Allegheny County v. Greater Pitt. A.C.L.U.*, 492 U.S. 573, 656 (1989). *Lemon* has not served, as some might have hoped, to provide clarity for lower courts and citizens, rather, it and its confused and conflicting progeny have made a muddle of, perhaps, the most important clauses of the Bill of Rights.

We have no doubt that the initial construction of the present jurisprudence was undertaken with the best of intentions, and its builders believed that both church and state would be best served if the state managed to maintain an active neutrality toward religion. However, as has been pointed out by Professor Carter, the neutrality approach does not effectively serve the goals of the religion clauses:

The ideal of neutrality [toward religion] might provide useful protection for religious freedom in a society of relatively few laws, one

in which most of the social order is privately determined. That was the society the Founders knew. In such a society, it is enough to say that the law leaves religion alone. It is difficult, however, to see how the law can protect religious freedom in the welfare state if it does not offer exemptions and special protection for religious devotion...carving out a special place for religion is the minimum it might be said that [the religion clauses do]...Neutrality treats religious belief as a matter of individual choice, an aspect of conscience, with which the government must not interfere but which it has no obligation to respect...indeed, it can be trampled by the state as long as it is trampled by accident. *Culture of Disbelief*, at 133.²

In effect, the neutrality approach has fostered a disrespect for religious faith in our nation's public discourse, if not an overt hostility. This very case before the Court for review demonstrates the absurd distortion of the Establishment Clause's purpose. The Kiryas Joel school provides the secular needs of citizens of the State of New York; secular education for disabled children. As initially noted by this Court, *Cmte. for Public Educ. v. Nyquist*, 413 U.S. 756, 772 (1972), previous cases before the Court involving the relationship between religion and education fall into two categories: public

2. See also, *Abington v. Schempp*, 374 U.S. 203, 306 (1963)(Goldberg, J., concurring)(warning of "untutored devotion to the concept of neutrality" yielding an unconstitutional hostility toward religion).

aid to parochial schools or students,³ and religious activities within public schools.⁴ In Kiryas Joel a public school has been

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3. *Zobrest v. Catalina Foothills*, 113 S.Ct. 2462 (1993)(sign language interpreter for parochial school student); *Aguilar v. Felton*, 473 U.S. 402 (1985)(public school instructors teaching on parochial school premises); *Witters v. Washington Dept. of Svcs.*, 474 U.S. 481 (1985)(aid to blind student at sectarian college); *Grand Rapids v. Ball*, 473 U.S. 373 (1985)(similar); *New York v. Cathedral Academy*, 434 U.S. 125 (1977)(reimbursement for record keeping and testing); *Wolman v. Walter*, 433 U.S. 229 (1977)(textbooks, diagnostic services, remedial education, standardized testing, trip transportation); *Roemer v. Bd. of Public Works*, 426 U.S. 736 (1975)(grants to private colleges); *Meek v. Pittenger*, 412 U.S. 349 (1972)(textbooks, materials, and other on-site services); *Cmte. for Public Educ. v. Nyquist*, 413 U.S. 756 (1972)(funds for repair and maintenance, tuition reimbursement and tax benefits for parents); *Levitt v. Cmte. for Public Educ.*, 413 U.S. 472(1972)(funds for testing); *Hunt v. McNair*, 413 U.S. 734 (1972)(revenue bonds for sectarian universities); *Tilton v. Richardson*, 403 U.S. 672 (1970)(construction grants); *Lemon v. Kurtzman*, 403 U.S. 602 (1971)(teacher salaries, books, materials); *Early v. DiCenso*, 403 U.S. 602 (1970)(salary supplements); *Bd. of Ed. v. Allen*, 392 U.S. 236 (1967)(textbooks); *Everson v. Bd. of Ed.*, 330 U.S. 1 (1946)(bus transportation).
4. *Lee v. Weissman*, 112 S.Ct. 2649 (1992)(prayer at graduation); *Edwards v. Aguillard*, 482 U.S. 578 (1982)(statute mandating teaching of creation science); *Wallace v. Jaffree*, 472 U.S. 38 (1985)(moment of silence); *Stone v. Graham*, 449 U.S. 39 (1980)(posting of Ten Commandments); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963)(prayer in school); *Engel v. Vitale*, 370 U.S. 421 (1961)(prayer); *Epperson v. Arkansas*, 393 U.S. 97 (1968)(barring teaching of evolution); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1947)(religious teaching by sectarian teachers); see also, *Lamb's Chapel v. Center Moriches U.F.S.D.*, 113 S.Ct. 2141 (1993)(use of school premises by religious group);

created to provide nothing but secular instruction to students and it has been found to be a violation of the Establishment Clause by virtue of the fact that all its students share a common religious faith. The creation of the school does not further a religious principle of the Satmar-Jewish faith in any way, all that remains as the basis of the opponents' objections is the religious identity of the Kiryas Joel community and their children. Carried to its logical conclusion, finding this school district to be an establishment of religion would require finding any other governmental structure present in a religiously homogenous community to be similarly invalid under the First Amendment.

The *Lemon* test's yielding this result is, perhaps, the best argument that can be offered for why the test, especially the ambiguous "primary effect" aspect of it, should be permanently discarded.

The seeds of a more workable approach have already been planted in the Court's jurisprudence and should now be cultivated independently from *Lemon*'s strangling roots. The concept of allowing for the accommodation of religion while proscribing state endorsement of religion can serve as a workable and useful approach in the application of the religion clauses. See, Elliott M. Berman, *Endorsing the Supreme Court's Decision to Endorse Endorsement*, 24 Colum. J.L. & Soc. Probs. 1 (1991). Such an approach would borrow concepts already present in the Court's opinions but, with a clear renunciation of *Lemon*, be modified and expanded into a more

Widmar v. Vincent, 454 U.S. 263 (1981)(same); *Zorach v. Clauson*, 343 U.S. 306 (1952)(time release program).

coherent theory. Furthermore, an "accommodation/no-endorsement" approach would allow the Court to finally do what the text of the Constitution clearly intended; to read both the Free Exercise Clause and the Establishment Clause as coherent whole. See, generally, Michael McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev., 1; Thomas R. McCoy & Gary A. Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 Vand. L. Rev. 249 (1986).

A unified theory of the religion clauses would begin with the Free Exercise Clause. It would set the initial parameters of the state's relationship to religious citizens and communities. It would demand "positive accommodation" of the religious in our society. If the state were to pass a neutral law of general applicability that resulted in a burden on a religious practice the state would be required to demonstrate a compelling interest in not accommodating those citizens whose religious faith is burdened by the statute.⁵

Complementary to the Free Exercise aspect of the approach would be a no-endorsement demand resulting from the Establishment Clause. This clause would be properly understood to govern situations where the state has opted to benefit a religious community or citizens when it was otherwise not required to. A state may be assumed to be seeking to accomplish a legitimate purpose when it seeks to allocate its resources to its constituent communities. The issue, therefore, under the Establishment Clause would be whether the state was

5. Although the compelling interest test was rejected in *Employment Div. v. Smith*, *supra*, it has been reintroduced by legislation passed by Congress and signed by the President in the Religious Freedom Restoration Act, P.L. 103-141 (1993).

improperly endorsing religion. If the state attempted to inappropriately endorse one religion, or religion as opposed to non-religion, this would be correctly viewed as violative of the Constitution; it would be a "negative accommodation." It is crucial, however, that religious constituencies must be as entitled to benefits from the modern state as much as any other constituency. To suggest otherwise is to turn the Establishment Clause into a device that disables the devout citizen rather than uphold his or her liberty. In a case such as this, the Court could properly conclude that New York seeks to fulfill its secular aim of educating handicapped children in secular studies and is doing so in a manner which is beneficial to a religious community, while not endorsing that community's beliefs.

Essentially, the unified theory suggests that the Free Exercise Clause sets the minimum deference the state must give to its religious members by means of positively accommodating their religious callings when a conflict may arise. The Establishment Clause sets the outer boundaries of permissible, optional undertakings by the state to aid religious communities. An accommodation which came to be viewed as endorsement would be branded a negative accommodation and be rejected.⁶

6. This aspect of the approach could be taken a step further and allow for greater latitude for state aid to religion if, instead of endorsement, coercion of non-believers or other-believers is the prohibited state activity. We do not advocate that approach at this time, although it too has been offered by members of this Court. See *Allegheny County, supra*, (Kennedy, J., concurring in part and dissenting in part).

This unified approach, which we have described, extends and elaborates the groundwork laid by members of the Court in their previous discussions of accommodation and endorsement.

Members of this Court have already noted that allowing for accommodation of religion does not signify governmental endorsement of religion. *Lee v. Weisman*, 112 S.Ct. 2649, 2676 (1992) (Souter, J., concurring). In fact, this Court has stated that "[i]t has never been thought either possible or desirable to enforce a regime of total separation..." (citing *Nyquist*, at 760)... "[n]or does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). If, in fact, there is a mandate for accommodation, not merely permission for it, the Court should conform the whole of its religion clause doctrine to allowance of such activities by the state. In *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985), Justice O'Connor approvingly recognized accommodation as a means of negotiating the relationship between the two religion clauses.

The question that remains to be answered under the unified approach is how courts and elected officials might seek to determine when an optional accommodation by the state has become an impermissible endorsement. At the core of the consideration would be the realization that our nation seeks to have a public sphere which is religiously pluralistic, not secular. Furthermore, we would add the elements elaborated by Justice O'Connor in *Wallace*, *supra*, at 76, 83. The first element is whether an "objective observer familiar with the text, legislative history, and implementation of the statute would

perceive it as state endorsement..." Additionally, "in determining whether a statute conveys a message of endorsement...courts should assume that the 'objective observer' is acquainted with the Free Exercise Clause and the values it promotes."

In addition to these elements, a proper analysis would seek to pre-empt any government activity that would coerce or induce a particular set of beliefs or practices, or force participation in religious observance in a direct manner. In a case such as this one, the creation of a public school district for a Satmar Hasidic community, other citizens would not be reasonably induced to become Satmar Hasids to obtain some similar benefit. Additionally, in a case such as this there would be no message of endorsement yielding an incentive to religious faith because the state is providing the Satmar community with a benefit the broader community already receives, public education.

The rationale for seeking the adoption of the accommodation/no-endorsement reading of the religion clauses and the consequent treatment of religious citizens as full members of the political order flows from the proper historical understanding of religion in our nation's political life. Professor Carter has pointed out that, unlike the neutrality approach:

Accommodation can be crafted into a tool that accepts religion as a group rather than an individual activity. When accommodation is so understood, corporate worship...becomes the [object] around which the state must make the widest possible berth. Accommodation is

therefore closer to...the Founders' conception of religious groups as autonomous moral and political forces...vital to preventing majoritarian tyranny. *Culture of Disbelief*, at 134.

This approach to religious citizens and their communities allows for the greatest protection of religious liberty and for the benefits that secure religious communities can offer the broader society by acting as important "mediating" institutions in our national life. The Court has recognized the protected status of a variety of such institutions; family, *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978), civic associations, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1983), and social clubs, *Moose Lodge v. Irvis*, 407 U.S. 163, 179 (1972), are but a few examples. Historically, and in modern times, however, no such institutions are more important to the process of developing and transmitting general concepts of our nation's civic moral life than our churches. It is in this sense that Tocqueville viewed religion as "the first of [America's] political institutions." Tocqueville, *Democracy in America*, 292 (Anchor ed. 1969). It is in this sense, as well, that James Madison sought to foster "the multiplicity of sects" to secure religious and civil liberty in our nation. *The Federalist*, No. 51, at 326 (Lodge ed. 1908)

II. A STATUTE CREATING A PUBLIC SCHOOL DISTRICT IN ORDER TO EDUCATE DISABLED CHILDREN, WITH BOUNDARIES THAT ARE COTERMINOUS WITH A LAWFULLY INCORPORATED MUNICIPALITY WHOSE RESIDENTS SHARE A COMMON RELIGIOUS FAITH, IS NOT UNCONSTITUTIONAL ON THE GROUND THAT SUCH STATUTE HAS THE "PRIMARY EFFECT" OF ADVANCING RELIGION WITHIN THE MEANING OF *LEMON v. KURTZMAN*, 403 U.S. 602 (1971).

Chapter 748 of the Laws of 1989 is constitutional even if the Court retains and applies the three part *Lemon* test. This case concerns the state provision of secular services, public special education for the handicapped, to a group of its citizens. It is not the form of assistance the Establishment Clause is designed to reach, nor is it the form of assistance that has been previously examined by the Court. By enacting Chapter 748, New York State created a public school district encompassing the Incorporated Village of Kiryas Joel, a community whose members share a common religious faith. The school of that district is a secular school offering only secular instruction for handicapped children. The Legislature and Executive of New York determined that the children of Kiryas Joel were not receiving the education they were entitled to when they attempted to attend a larger school district, it therefore gave them their own so that the State's goal of properly educating all its children might properly be accomplished. Such an effort to accomplish a secular goal through secular means cannot be understood as a breach of the Establishment Clause, even as understood by *Lemon v. Kurtzman* and its progeny.

The Court's opinion in *Lemon v. Kurtzman* offers a three part test for Establishment Clause case analysis: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...finally, the statute must not foster an excessive government entanglement with religion." *Lemon*, at 612. The creation of the Kiryas Joel school district by Chapter 748 meets each requirement of this three part test. The Court will note that the Court of Appeals invalidated Chapter 748 on the basis of the second prong, the "primary effect" prong, alone. We will, therefore, only briefly describe the validity of the statute under the first and third prongs as well, concentrating our discussion on the second prong.

A. THE LAW'S PURPOSE IS SECULAR

Chapter 748 has a clear, unmistakable, and legitimate secular purpose; ensuring that handicapped children living in the town of Kiryas Joel, New York receive appropriate public secular education to which they are statutorily entitled. The New York Legislature and the Governor clearly sought to fulfill this purpose, to the exclusion of any other. Governor Cuomo's Approval Message stated specifically that "this bill is a good faith effort to solve this unique problem [of the Kiryas Joel children failing to receive their proper education]." Approval Message of the Governor, 1989 N.Y. Legis. Ann. at 325. In the past, the Court has found state efforts to fund educational services valid under *Lemon's* first prong. The Court has recognized a "legitimate interest...in providing a fertile educational environment for all schoolchildren of the State." *Wolman v. Walter*, 433 U.S. 229, 236 (1977). In fact, "governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspect of

the *Lemon* framework." *Mueller v. Allen*, 463 U.S. 388, 394 (1983). In *Corp. of Presiding Bishop*, 483 U.S. 327, 335 (1987), this Court explained the aim of *Lemon*'s first prong: The "'purpose' requirement aims at preventing the relevant governmental decisionmaker...from...acting with the intent of promoting a particular point of view in religious matters." In no way can New York's effort to provide effective secular education for the disabled children of Kiryas Joel be viewed as the State promoting a particular view in religious matters.

Furthermore, even if the Court were to ignore these precedents and believe that a religious purpose is somehow served by creating the school district this Court should view it as a legitimate accommodation of religious practice. "[G]overnment acts with [a] proper purpose" when it undertakes to lift a governmental burden on the free exercise of religion. *Corp. of Presiding Bishop v. Amos*, *supra*, 338. "[The Constitution] affirmatively mandates accommodation" of religion. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Therefore, a statute designed to lift a burden on free exercise cannot violate *Lemon*'s "secular purpose" test.

B. THE LAW DOES NOT ENTANGLE CHURCH AND STATE

The third prong of *Lemon* seeks to prevent "excessive government entanglement with religion." No structure has been put into place that would foster governmental entanglement in the religious life of the Satmar community. The school at issue in this case, again, is a public school teaching nothing but secular studies and, therefore, is part of the regular educational apparatus of the State of New York. There is no need for any special monitoring mechanisms and

none have been created. There is no need since, unlike previous cases before the Court, this is not a case of public school programs in sectarian schools nor religious and public teachers working together in a public school. See, e.g. *Aguilar v. Felton*, 473 U.S. 402 (1985). This case unquestionably falls into the category described by the Court in *Wolman*, *supra*, at 248: "It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state."

C. THE PRIMARY EFFECT OF THE LAW IS SECULAR

The decision of the New York Court of Appeals centered on its finding that Chapter 748 violated the second prong, the "primary effect" prong, of the *Lemon* test. *Grumet v. Kiryas Joel*, *supra*, 81 N.Y.2d, at 527. Simply stated, the majority of the Court of Appeals erred in concluding that the primary effect of the statute is to create a symbolic union between New York State and the Satmar Hasidim. The opposite is true; the primary effect of creating the Kiryas Joel school district is to provide handicapped children with an appropriate secular education.

In analyzing whether the school district constituted an improper establishment of religion, the Court of Appeals relied on this Court's statement in *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 390 (1985), that the concern of the primary effects test is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denomination as an endorsement, and by non adherents as a disapproval, of their individual choices." *Grumet*, *supra*, at 528. As argued below by

petitioners, this reading of *Grand Rapids* is incorrect. Justice O'Connor, the original proponent of the perception-of-endorsement approach, has stated: "The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as endorsement." *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985). In this case an objective observer viewing any one of these elements would properly and reasonably conclude that New York was not endorsing the Satmar faith. The text of Chapter 748 makes no reference whatsoever to religion. The Governor's Approval Message specifically stated the position that the school district would be administered in a totally secular manner. The implementation; the actual operation of the school district has been nothing but secular since its opening. All of these facts undercut the analysis of the Court of Appeals.

Additionally, the Court should note that the reasoning employed by the New York Court in its finding an improper establishment runs afoul of this Court's statements on this issue in other cases. The Court below found a "symbolic union of church and state" in the act that only Hasidic children will attend the public schools in the newly established school district, and only members of the Hasidic sect will likely serve on the school board." *Grumet*, at 529. This is an almost frightening piece of reasoning. The fact that the residents of Kiryas Joel share a common religious faith results in finding secular government action for that community an establishment of religion. Followed to its logical conclusion, this reasoning would no doubt invalidate institutions across our country in the thousands of localities where only Protestants reside, or only Catholics reside, or only Episcopalians reside. More importantly, in her concurring opinion in *Lynch, supra*, at 687,

Justice O'Connor correctly stated that the "Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." The Court of Appeals in determining precisely that the adherence of the residents of Kiryas Joel to the Satmar faith, and nothing else invalidates the school, is itself making the faith of the persons relevant to their standing in the political community and finding that as a result of that faith they are not entitled, as any other members of the political community, to the full range of their benefits of citizenship. A court cannot, consistent with the Free Exercise Clause, impose such a disability on the Kiryas Joel community on the basis of their religious views or status. *See, Employment Div. v. Smith*, 110 S.Ct. 1595, 1599 (1990).

Central to this case's analysis should be the fact that there is no religious tenet of the Satmar faith being served by the creation of the separate school district. Satmar Hasidim are a sect of Jews. Separatism is not a religious precept of Judaism or the Satmar sub-faith. Maintaining a separate community is viewed by Satmar Hasidim as a more conducive method for fostering and maintaining religious belief and practice, nothing more. The essential motivation for seeking a school for the handicapped for their children alone is neither to further core religious tenets or the peripheral aid of a separate environment, it is the desire for secular education for the handicapped children; education that was not benefitting the children when they were exposed to the additional "handicaps" of confronting a different language, lifestyle, and mode of dress in the broader Monroe-Woodbury school.

Beyond the fact that the creation of the Kiryas Joel district is not an endorsement of religion and thereby not

violative of the "primary effect" test, it may be the very type of accommodation of religion demanded by the Court's reading of the Free Exercise Clause. Just as "[i]n freeing the Native American Church from federal laws forbidding peyote use...the government conveys no endorsement of peyote rituals, the Church, or religion as such," *Lee v. Weisman*, 112 S.Ct. 2649, 2677 (1992) (Souter, J., concurring), New York's creation of the Kiryas Joel school district ought to be understood, at most, as properly accommodating the religious needs of the Satmar residents. The loss of publicly funded special education qualifies as a burden deserving the state's accommodation especially since that accommodation is minimal. The public school in Kiryas Joel is perfectly willing to accept any child within its jurisdiction, not only Satmar children, and its activities are nothing but secular.

Furthermore, an accommodation need not be compelled by the Free Exercise Clause for it to pass constitutional muster under the Establishment Clause. *Waltz v. Tax Comm'n*, 397 U.S. 664, 673 (1970). The citizens of Kiryas Joel, therefore, need not demonstrate that they are entitled to a separate school district for Chapter 748 to be found a constitutional accommodation.

Lastly, the Kiryas Joel case is appropriately governed by the Court's decision in *Wolman v. Walter*, *supra*, a case decided utilizing the *Lemon* analysis. In *Wolman* the Court stated that "providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion." *Wolman* at 248. No constitutional violation was found in the "fact that a unit on a neutral site may...serve only sectarian pupils." *Id.*, at 247. Chapter 748 creates a neutral site at which sectarian

pupils receive appropriate secular therapeutic services. The Kiryas Joel public school is just that, a public school. It, therefore, should be found a valid means of providing for the secular needs of Kiryas Joel's children since it does not have the primary effect of advancing religion.

CONCLUSION

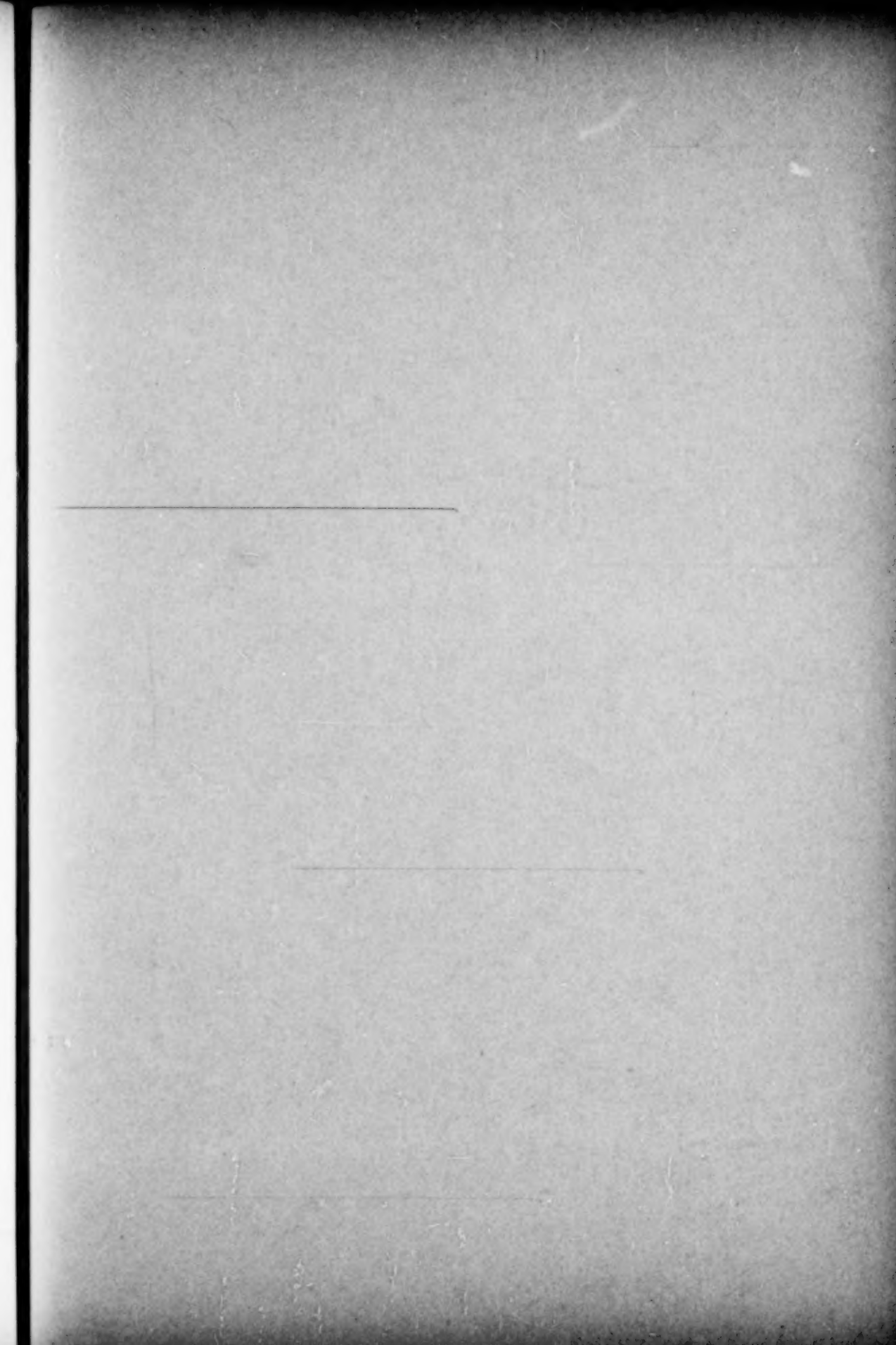
In *Grand Rapids, supra*, at 431, Justice O'Connor wrote in dissent that "[f]or these children, the Court's decision is tragic. The Court deprives them of a program that offers a meaningful chance at success in life..." It would be similarly tragic for the children of Kiryas Joel to be deprived of their best chance at success in life by the invalidation of Chapter 748. It would be an even greater tragedy, however, because it would send the unequivocal message to all citizens of our nation that possess a religious faith that they are not as entitled to government support of their secular needs as their non-religious neighbors.

For the foregoing reasons, the judgement of the Court of Appeals should be reversed with instructions to enter judgement for the defendants.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1993

BOARD OF EDUCATION
OF THE KIRYAS JOEL VILLAGE
SCHOOL DISTRICT, ET AL.,

Petitioners,

v.

LOUIS GRUMET, ET AL.,

Respondents.

ON A WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

BRIEF OF THE RUTHERFORD INSTITUTE
AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Establishment Clause prohibits a state, in order to provide a government program of secular instruction for handicapped children, from accommodating the childrens' religious and cultural background by creating a school district congruent with a religiously homogenous municipality.

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ON A WRIT OF CERTIORARI TO THE
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BRIEF OF THE RUTHERFORD INSTITUTE
AMICUS CURIAE, IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*¹

This case presents significant questions concerning the accommodation of religious persons who reside in a political community composed of people subscribing to the same religious beliefs. The State of New York has allegedly created an unlawful "religious gerrymander" by empowering a political unit with a presumably homogenous religious majority to provide educational services to its handicapped children. This case thus presents important questions about the extent to which a state may accommodate religious and cultural distinctions in

¹ Counsel of record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 37.

providing secular education to handicapped children and whether the State's franchise of a political community with a religiously homogeneous population is a violation *per se* of the Establishment Clause.

Amicus Curiae — The Rutherford Institute — has as one of its principal purposes the elimination of governmental discrimination against persons or groups based on their religious beliefs. The resolution of the issues presented by this case is not only important to the jurisprudence of the First and Fourteenth Amendments, it is vital to the furtherance of religious tolerance as reflected in the accommodation of citizens whose religious beliefs foster "a way of life that [may be] odd or even erratic but interferes with no rights or interests of others. . . ." *Wisconsin v. Yoder*, 406 U. S. 205, 224 (1972).

Amicus Curiae is a non-profit religious corporation named for Samuel Rutherford, a 17th-century Scottish theologian and Rector at St. Andrew's University. With its international office in Charlottesville, Virginia, The Rutherford Institute undertakes to assist litigants in the 50 states and to participate in cases relating to the Free Speech and the Religion Clauses of the First Amendment. Counsel for *amicus curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF THE CASE

This brief incorporates by reference the statement of facts contained in the principal brief of the Petitioner, Board of Education of the Kiryas Joel School District. It is nevertheless appropriate to restate succinctly what few facts are genuinely relevant to this *facial* challenge to the constitutionality of Chapter 748 of the Laws of 1989 of the State of New York ("Chapter 748").

Chapter 748 creates a public school district for the Village of Kiryas Joel (an incorporated municipality in the Town of Monroe, Orange County, New York). It establishes a board of education composed of from five to nine members elected by the voters of the Village. *Grumet v. Board of Education*, 81 N. Y.2d 518, 525, 618 N. E.2d 94, 97 (N. Y. 1993). Chapter 748 contains *no* peculiar religious language. It simply creates a New York school district under a law similar to those creating other New York school districts.²

There is no allegation in this case that a defined religious institution such as a parochial school or church is unlawfully receiving state assistance. Likewise, no religious curriculum or religious practice is being taught, propagated or proscribed in the public schools. Nor is there any dispute that the *only* educational services the Kiryas Joel School District provides under its general statutory powers is a secular program for teaching handicapped children residing within the Village (or children under contract with other school districts). Moreover, the Village School District's limited use of its more general powers squares with the legislative intent to accommodate the Village's unique problem of providing an acceptable learning environment for the Village's otherwise minority-religion handicapped children. But for the difficulties encountered in their attendance at the neighboring Monroe-Woodbury Central School District, and the consequent attempted accommodation in the Village School District, there would be no Establishment Clause challenge in this case.

² The only apparent reference to religion in the legislative history enacting Chapter 748 is an indication in the Governor's Approval Memorandum that it represents "an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the Village of Kiryas Joel, whose population are all members of the same religious sect." *Id.* This statement recognizes the legislative intent to resolve a dispute among municipalities in the State of New York in the provision of services for the handicapped. It also recognizes the accommodation made for the benefit of the Village of Kiryas Joel.

SUMMARY OF ARGUMENT

Chapter 748 does not provide financial assistance to any religious institution such as a parochial school or church. Nor does it prescribe or proscribe religious teaching or practices. Instead, it simply creates in *neutral* fashion a public school system for the Village of Kiryas Joel in order to provide a limited program of education for handicapped children residing there.

In Establishment Clause jurisprudence, this Court has “repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area.” *Lynch v. Donnelly*, 455 U. S. 668, 679 (1984). Although Respondents and the New York Court of Appeals have invoked the tri-partite test of *Lemon v. Kurtzman*, 403 U. S. 602 (1971), the standard of review best suited to the review of New York’s allegedly *neutral* political line-drawing in this case is an equal protection analysis that properly takes into account both Establishment Clause “neutrality” *as well as* the allegations of “religious gerrymandering” and *de jure* segregation.

This Court has heretofore recognized that the principle of “[n]eutrality in its application requires an equal protection mode of analysis.” *Walz v. Tax Commission*, 397 U.S. 664, 696 (1970). Moreover, it only reaffirmed last Term that “[i]n determining if the object of a law is a neutral one, we can. . . find guidance in our equal protection cases.” *Church of Lukumi Babalu Aye v. City of Hialeah*, ___ U. S. ___, 113 S. Ct. 2217, 2230 (1993); citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977). Neutrality and equal protection principles properly account for the practical reality that “[i]n the line-drawing process, racial, *religious*, ethnic, and economic gerrymanders are all [deemed to be] species of political gerrymanders.” *Mobile v. Bolden*, 446 U. S. 55, 88 (1980) (Stevens, J., concurring in the judgment) (emphasis added).

Under this Court's gerrymandering cases, claimants must present not only evidence of intentional invidious discrimination based on a suspect classification, but evidence of adverse degradation of "a voter's or a group of voters' influence on the political process." See *Davis v. Bandemeer*, 478 U. S. 109, 132-133 (1986); see also, *Wright v. Rockefeller*, 376 U. S. 52 (1964), *Mobile v. Bolden*, 446 U. S. 55 (1980), and *Rogers v. Lodge*, 458 U. S. 613 (1982). A similar evidentiary inquiry is all the more required in the present case because the State action was allegedly taken, in part, as a benevolent accommodation to the Satmar Hasidim. In matters of race, no Clause explicitly guarantees "affirmative action," but in matters of religion, the Free Exercise Clause explicitly contemplates *affirmative* accommodation of rights of conscience, particularly when the accommodation furthers secular objectives and does not adversely affect others or primarily advance religious ends. *Bowen v. Kendrick*, 487 U. S. 589, 621-622 (1988).

In the absence of any evidence from Respondents showing that the object of Chapter 748 was intentional invidious discrimination, Chapter 748 must survive *facial* attack. A review of its object or purpose yields the conclusion that this facially *neutral* law "serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion or cluster of religions." *Gillette v. United States*, 401 U. S. 437, 452 (1971). It represents a legitimate means of advancing handicapped education and accommodating, without endorsing, the Satmar Hasidim culture. The school system does not teach Satmar Hasidim doctrine, nor does it advance that religion's practices in any respect, but, in fact, integrates Satmar Hasidim children into the secular realm from which they are apparently otherwise separated. Here, non-sectarian public educators teach a secular curriculum at a neutral site in a neutral manner. And no evidence has been offered by Respondents about offending programs, courses, teachers, or books that might suggest the contrary. Absent hard evidence, further inquiry must await

Respondents' "as applied" challenge on a complete evidentiary record.

It would be an unprecedented and grave mistake for this Court to adopt a *per se* rule requiring invalidation of a governmental subdivision solely because of the religious homogeneity of the Village's political community. This Court should not yield to the commands of purported constitutional doctrine that would ignore the *neutral* means by which a political community seeks to provide a *neutral* program of secular educational services for the handicapped in a manner that does *not* discriminate invidiously on the basis of religion or otherwise advance or endorse religion.

ARGUMENT

I. INTRODUCTION.

This is a case of first impression. The central issue, as noted Chief Judge Judith Kaye in concurrence below,³ is not one of state aid to religious institutions or the validity of prescribed or proscribed religious instruction or practices, but whether the New York General Assembly's political line drawing providing services to handicapped children living within the homogenous Kiryas Joel religious community is constitutional. The issue is thus one of alleged political gerrymander and *de jure* segregation on the basis of religion. *Id.* 81 N. Y.2d at 536, 618 N. E.2d at 105. For purposes of constitutional analysis, the case arises at the intersection of the Religion and Equal Protection Clauses.

II. SEPARATION, ACCOMMODATION AND PUBLIC WELFARE LEGISLATION.

This Court's Religion Clause doctrine rests on certain assumptions as to the scope of state as well as religious activities.

³ See discussion and cases cited in concurring opinion of Chief Judge Judith Kaye, *Grumet v. Board of Education*, 81 N.Y.2d at 533, n.2 and n.3, 618 N.E.2d at 102, n.2 and n.3.

The basic principles underlying the Religion Clauses are, of course, the separation of church and state and the accommodation of individual rights of conscience. Separation principles presuppose that the government's role in society is limited and that religious activity takes place within discrete bounds which the state cannot and should not reach and within which religion should function. In contrast, accommodation principles permit, and, at times, require the state to withdraw from certain spheres where its actions unnecessarily threaten individual rights of conscience and free exercise.

While it is axiomatic that the "[Establishment] Clause *does* absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith," *Grand Rapids School District v. Ball*, 473 U. S. 373, 385 (1985) (emphasis added); *Walz v. Tax Commissioner*, 397 U. S. 669, 668 (1970), the boundaries of the Establishment Clause are nevertheless more blurred and indistinct when it comes to the collision of pervasive government welfare programs with religious activity and practice. Because "[no] institution within [society] can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government," *Lynch v. Donnelly*, 465 U. S. 668 (1984) *quoting Zorach v. Clauson*, 343 U. S. 306, 314-315 (1952), it becomes necessary — indeed, inevitable, in light of vitally held political and religious convictions — for legislatures (and courts) to resolve conflicts arising at the crossroads of state action and private religious tenets. *See, e.g., West Virginia Board of Education v. Barnette*, 319 U. S. 624 (1943); *Sherbert v. Verner*, 374 U. S. 398 (1963); *Wisconsin v. Yoder*, 406 U. S. 205 (1972); *Wooley v. Maynard*, 430 U. S. 705 (1977).

In evaluating these and other conflicts under the Free Speech and Religion Clauses of the First Amendment, this Court has routinely acknowledged that accommodation of the religious beliefs of the American people is necessary or permitted

to achieve both the broad purposes of the Religion Clauses and the public welfare objectives of the modern administrative state. See, e.g., *McGowan v. Maryland*, 366 U. S. 420 (1961); *Roemer v. Board of Public Works*, 426 U. S. 761 (1976); *Presiding Bishop v. Amos*, 483 U. S. 327 (1987); *Bowen v. Kendrick*, 487 U. S. 589 (1988). Thus, although the Free Exercise Clause may not necessarily *require* society to accommodate religious practice under "neutral laws of general applicability," *Employment Division v. Smith*, 494 U. S. 872 (1990),⁴ this Court has nevertheless recognized that "a society that believes in the negative protection afforded [by the First Amendment] to religious belief can be expected to be solicitous of that value in its legislation as well." *Id.* at 890. Legislative accommodation of rights of conscience is consistent with earlier pronouncements of this Court that "government may (and sometimes must) accommodate religious practices and. . . it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U. S. 136, 144-145 (1987).

The permitted reach of accommodation is often at issue.⁵ Whether or not government should accommodate a particular religious practice depends in large degree on an evidentiary finding whether the governmental program is, or threatens to become, primarily religious or whether, despite incidental benefits to religion, its primary objective and operation remains, and is likely to remain, secular. *Bowen v. Kendrick*, 487 U. S. at 605-618.

⁴ But see, the apparently higher standard imposed on government action by The Religious Freedom Restoration Act, P. L. No. 103-141, November 16, 1993, 107 Stat. 1488-1490.

⁵ It is clear that "[g]overnment can *accommodate* religion by lifting government-imposed burdens on religion," *Allegheny County v. Greater Pittsburgh ACLU*, 492 U. S. 573, 631 (1987) (O'Connor, J. concurring) (emphasis in original). This includes "alleviat[ing] significant governmental interference" with religious practice (*Presiding Bishop v. Amos*, 483 U. S. 327, 335 (1987)) and removing "a demonstrated and possibly grave imposi-

III. BENEVOLENT GERRYMANDERING — A PERMITTED MEANS OF ACCOMMODATION?

Unlike virtually all other Establishment Clause cases challenging aid to education, the unique aspect of the present case is that no defined religious institution such as a parochial school or church is alleged to have received assistance. Nor has the state prescribed or proscribed religious teaching or practices. Instead, New York has simply created a public school system for the Village of Kiryas Joel. The system is subject to the same laws and regulations governing public education in the State of New York as any other school district.

Chapter 748 in and of itself thus presents no particular constitutional problem. Rather, it is the congruence of the Village of Kiryas Joel with its Satmar Hasidim population that presents the heart of this facial constitutional challenge. Has, then, the State of New York effected a "religious gerrymander" by creating a school district in a religiously homogenous political unit? And does its grant of governmental power to an elected school board in that unit exceed constitutional boundaries when the school district limits its activities to providing only a program of secular education to handicapped children?

Although the Respondents have argued that this case should be reviewed under the tri-partite test set forth in *Lemon v. Kurtzman*,⁶ this Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch v. Donnelly*, 455 U. S. at 679. It has, in fact, eschewed the *Lemon* test on more than one occasion and employed several other legal frameworks depending upon the

tion on religious activity sheltered by the Free Exercise Clause." *Texas Monthly v. Bullock*, 489 U. S. 1, 18, n. 8 (1989). And the Court has never held "that all benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause." *Id.*

⁶ 403 U. S. 602 (1971).

nature of the Establishment Clause challenge before it. *See, e.g., Larson v. Valente*, 456 U. S. 228 (1982) (Equal Protection standard); *Marsh v. Chambers*, 463 U. S. 783 (1983) (Original Intent standard); *Lee v. Weisman*, 505 U. S. ___, 112 S. Ct. 2649 (1992) (Coercion standard); and *Zobrest v. Catalina Foothills School District*, ___ U. S. ___, 113 S. Ct. 2462 (1993) (General government program/Private choice standard).

Because the present case raises only a *facial* challenge to a legislative enactment involving the delegation of the state's political power, the standard of review best suited to the facts and circumstances is not the *Lemon* test, but an equal protection standard. The latter standard more properly accounts for the allegations of "religious gerrymandering" and *de jure* segregation arising from New York's allegedly *neutral* political line drawing. After all, the Establishment Clause principle of "[n]eutrality in its application requires an equal protection mode of analysis." *Walz v. Tax Commission*, 397 U.S. 664, 696 (1970). And this Court only reaffirmed in another Religion Clause case last Term that "[i]n determining if the object of a law is a neutral one, we can also find guidance in our equal protection cases." *Church of Lukumi Babalu Aye v. City of Hialeah*, ___ U. S. ___, 113 S. Ct. 2217, 2230 (1993). Those cases suggest that the object of a law is to be determined from an inquiry into "both direct and circumstantial evidence" of an intentionally discriminatory legislative purpose. *Id.*, citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977).⁷

⁷ In *Church of Lukumi*, the Court was concerned with the alleged targeting and burdening of a specific religion. In evaluating the alleged intentional discrimination, the Court stated that the "[r]elevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, as well as the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Id.*, citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. at 267-268; *see also, Washington v. Davis*, 426 U. S. 229 (1976).

The "neutrality" principles from Religion Clause cases thus readily coincide with the gerrymandering principles this Court has applied in cases where "[i]n the line-drawing process, racial, *religious*, ethnic, and economic gerrymanders are all [deemed to be] species of political gerrymanders." *Mobile v. Bolden*, 446 U. S. 55, 88 (1980) (Stevens, J., concurring in the judgment). Such legislative apportionments may "violate the Fourteenth Amendment if their purpose [is] invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." *id.* at 66 (plurality opinion); *Shaw v. Reno*, ___ U. S. ___, 113 S. Ct. 2828 (1993). Thus, under this Court's Equal Protection gerrymandering cases,⁸ claimants must present not only *proof* of intentional discrimination based on a suspect classification, but *evidence* of adverse degradation of "a voter's or a group of voters' influence on the political process as a whole" or "*evidence* of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Davis v. Bandemeyer*, 478 U. S. 109, 132-133 (1986) (emphasis added). The system in question must be "'conceived or operated as [a] p[ur]poseful devic[e] to further. . . discrimination.'" *Rogers v. Lodge*, 458 U. S. at 619, *quoting Mobile v. Bolden*, 446 U. S. at 66, and *Whitcomb v. Chavis*, 403 U. S. 124, 149 (1971).⁹ As Justice Stewart said in the *Mobile* case (which dealt with line drawing on racial grounds), "... where the character of a law is readily explainable on grounds apart from race, . . . disproportionate impact alone cannot be decisive, and courts must look to

⁸ *Wright v. Rockefeller*, 376 U. S. 52 (1964); *Mobile v. Bolden*, 446 U. S. 55 (1980); *Rogers v. Lodge*, 458 U. S. 613 (1982); *Davis v. Bandemeyer*, 478 U. S. 109 (1986).

⁹ A finding of "[p]urposeful. . . discrimination invokes the strictest scrutiny of adverse differential treatment," but "[a]bsent such purpose, differential impact is subject only to the test of rationality." *Rogers v. Lodge*, 458 U. S. 613, 617, n. 5 (1982), *citing Washington v. Davis*, 426 U. S. at 247-248.

other evidence to support a finding of discriminatory purpose." *Mobile v. Bolden*, 446 U. S. at 70 (emphasis added).

The analysis of religious discrimination as a "suspect" classification departs somewhat from that employed in matters of race. Whereas there is no Clause explicitly guaranteeing "affirmative action" in matters of race, the Free Exercise Clause explicitly contemplates *affirmative* accommodation of Free Exercise rights of conscience, particularly when the accommodation in question furthers secular objectives and does not adversely affect others or advance religious ends (except perhaps incidentally with its intended secular goals). Thus, when a "religious gerrymander" is alleged as a result of "accommodating" a religious practice, for state action to be unconstitutional, there must be an *evidentiary* inquiry to determine whether that accommodation intentionally advances religion (*Bowen v. Kendrick*, 487 U. S. at 621-622) and results invidiously in "excluding individuals belonging to any other group from enjoyment of the relevant opportunity." *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U. S. 144 (1977); cf. *Larson v. Valente*, 456 U. S. at 255.¹⁰ On the record in the present case, the mere creation of a school district coincident with a religious community does not satisfy the level of proof necessary to demonstrate purposeful invidious discrimination and certainly does not constitute a *per se* violation of the Establishment Clause.

¹⁰ Chief Judge Kaye, in concurrence below, contends that this case should be reviewed under the standard of review applied in *Larson v. Valente*, 456 U. S. 228 (1982). While the Court in the *Larson* case applied an equal protection standard, that case is significantly different from the present case because it involved a statute that *on its face* imposed a *disability* on a religious sect and produced what was, in effect, a denominational preference that directly *burdened* religious practice. The present case, on the other hand, does *not* involve a *facial distinction*, or a preference of one denomination or sect over another, or an alleged demonstrable burden to other denominations or sects or religion or non-religion. Moreover, the purposes of Chapter 748 are *neutral*: providing secular education for the handicapped, resolving a

First, Chapter 748 is a facially *neutral* law. It simply creates a school system. It "serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion or cluster of religions." *Gillette v. United States*, 401 U. S. 437, 452 (1971). Apart from its plain language, the enactment's clearly stated purpose is to enable handicapped children in the Village of Kiryas Joel to obtain special educational services. As with other social welfare legislation challenged on Establishment Clause grounds, the "affirmative purposes" of Chapter 748 are "neutral and secular" and "cannot be said to reflect a religious preference." *Id.* at 454; *accord*, *Zobrest v. Catalina Foothills School District*, ___ U. S. at ___, 113 S. Ct. at 2469. Indeed, in *Zobrest*, this Court found that "[h]andicapped children. . . are the primary beneficiaries. . . ." and "the function" of the law there was "hardly 'to provide desired financial support for nonpublic sectarian institutions.'" *Id.* citing *Witters v. Washington Dept. of Services for the Blind*, 474 U. S. 481, 488 (1986). Chapter 748 is even more neutral in purpose, benefit and function. As this Court reasoned in the *Gillette* case:

The point is that [the] affirmative purposes are *neutral* in the sense of the Establishment Clause. . . it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the

dispute between municipalities and accommodating the minority religion Satmar Hasidim.

Thus, because in the present case (1) there is no facial classification or preference, (2) the purposes are secular and neutral and (3) there is no alleged adverse disability, injury or harm resulting from the accommodation, the *Larson* equal protection analysis, while appropriate as a starting point, should not be dispositive in the absence of an *evidentiary* showing of intentional invidious discrimination and some concrete disability or burden on religious practice. Without such a showing, there is no need for New York to "narrowly tailor" or "closely fit" its chosen means of accommodation.

dictates of conscience. [citing *Abington School District v. Schempp* 374 U. S. 203, 294-299; 306; 309 (1963)]

* * * *

Neutrality in matters of religion is not inconsistent with 'benevolence' by way of exemptions from onerous duties. . . so long as an exemption is tailored broadly enough that it reflects valid secular purposes.

Id. at 453-454 (emphasis added).

Similar reasoning prevailed in this Court's cases upholding Sunday Closing Laws against an Establishment Clause challenge. The Court recognized that "those Laws were "oriented. . . toward improvement of the health, safety, recreation and general well-being of our citizens." *McGowan v. Maryland*, 366 U. S. 420, 444 (1961); accord, *Two Guys v. McGinley*, 366 U. S. 582 (1961); *Braunfeld v. Brown*, 366 U. S. 599 (1961); *Gallagher v. Crown Kosher Market*, 366 U. S. 617 (1961). The Court concluded then, as it has since, that "the 'Establishment Clause' does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." *Id.* at 442; cf. *Harris v. McRae*, 448 U. S. 297, 318-320 (1980). And despite the appellants' suggestion that the State of Maryland could achieve its objectives by less intrusive alternatives such as requiring individual citizens to choose an unspecified day for rest during the week, this Court did not require Maryland to alter its selected method of achieving the State's public welfare obligations through its Sunday Closing Laws.

Other public welfare legislation has likewise been upheld against facial Establishment Clause challenge when the purposes for the legislation were found to be aimed at legitimate public welfare objectives. Thus, in *Bowen v. Kendrick*, *supra*, 487 U. S. 589, this Court upheld Federal social legislation

permitting religious organizations to administer teen and family life programs. Unlike the present case, the *Bowen* legislation on its face specifically required government to make an effort to involve religious organizations in the government programs. Notwithstanding this mandate, the Court found the statutory purposes of eliminating the social and economic problems caused by teenage sexuality, pregnancy and parenthood to be secular in nature. The Court also found that the participation of religious organizations in the government programs was "at most 'incidental and remote'" and created no impermissible "primary effect." *Id.* at 607, 610-615. And it concluded that there was nothing in the record to suggest that "religiously affiliated AFLA [Adolescent Family Life Act] grantees are not capable of carrying out their functions under the AFLA in a lawful, secular manner." *Id.* at 612.¹¹ *Bowen* stands for the proposition that a social welfare statute that *neutrally* authorizes only secular functions must be presumed to operate in a secular manner and can be determined to be unconstitutional *only* after an affirmative *evidentiary* showing to the contrary in an "as applied" challenge. 487 U. S. at 618-622.

The Equal Access Act,¹² a law granting students equal access to public school facilities for religious, philosophical, political and other speech, was also upheld by this Court against an Establishment Clause challenge, notwithstanding the fact that language in the Act was aimed at benefiting religious and other speech. *Westside Community Board of Education v. Mergens*, 496 U. S. 226, 248 (1990). This Court emphasized the importance of looking at the legislative *purpose*, and not the "possibly

¹¹ The *Bowen* Court also held that "religious institutions are [not] disabled from participating in publicly sponsored social welfare programs." *Id.* at 609, citing *Bradfield v. Roberts*, 175 U. S. 291 (1899) (Federal funding of construction of a hospital conducted under the auspices of the Roman Catholic Church).

¹² The Equal Access Act, P. L. No. 98-377, Title VIII, August 11, 1984, 98 Stat. 1302.

religious motives of the legislators who enacted the law.” *Id.* at 249. The Act was aimed at granting affirmative equal access to students for speech activities in public school forums without regard to content of the message. In the present case, Chapter 748 provides access for handicapped children of the Satmar Hasidim to special education services in a religiously *neutral* environment. An accommodation for this purpose, as in the *Mergens* case, presents a “message [that] is one of neutrality rather than endorsement. . . .” *Id.*

IV. DRAWING THE LINE BETWEEN ACCOMMODATION AND ENDORSEMENT OF RELIGION.

The only argument suggesting an impermissible religious purpose in the present case is the one for which the accommodation was actually made, namely, that by permitting the Village’s purportedly homogeneous, “separationist” religious population to elect a school board to operate a school system, the State impermissibly endorses “separationist” doctrine and advances religious practices in furtherance of that doctrine. Judge Hancock in the court below described Chapter 748 as being “designed. . .so that the children would remain subject to the language, lifestyle and environment created by the community of Satmar Hasidim and avoid mixing with children whose language, lifestyle and environment are not the product of that religion.” *Grumet v. Board of Education*, 81 N.Y.2d at 540, 618 N. E. 2d at 107 (Hancock, J. concurring), *quoting Grumet v. Board of Education*, 592 N.Y.S.2d 123 (A.D. 3 Dept. 1992). There are several fallacies to this argument.

First, it runs contrary to fact. The new school district’s programs and services do *not* track Satmar Hasidim separatist principles. English, not Yiddish, is the language of instruction. Contrary to Satmar Hasidic practice, male and female instructors teach. Similarly, male and female students are grouped together for teaching without distinction as to instructional materials. The school building is secular in appearance and

devoid of religious symbols. Employee dress is secular. See *Grumet v. Board of Education*, 81 N.Y.2d at 556, 618 N. E. 2d at 117 (Bellacosa, J. concurring). No religious instruction is given at the school. Teachers are hired without regard to religious beliefs. See Affidavit of Dr. Stephen M. Benardo, Appendix to the related Board of Education of Monroe-Woodbury Petition for Certiorari, No. 93-527 ("Monroe-Woodbury Appendix"), 117a-118a. Moreover, the "motive for the Satmar parents... was not religious, but was to protect the children from the psychological and emotional trauma caused by exposure to integrated classes outside the Village. . . ." See *Grumet v. Board of Education*, 592 N.Y.2d at 131 (Levine, J. dissenting). These are but a few of the defining characteristics of the school district that, far from "endorsing" religion, depart significantly from Satmar Hasidim beliefs and practices. They also confirm the non-sectarian motivation of the Satmar Hasidim parents who, in seeking the *neutral* accommodation that a local public school system would offer, were obviously troubled by the acculturation problems which arose from attendance in other school districts.

Second, the Respondents' argument that accommodation in this case constitutes State endorsement of "Satmar-separationism" is not born out in law or fact. Certainly, this Court's ruling in *Wisconsin v. Yoder*¹³ — which accommodated Amish practices to isolate, insulate and separate Amish children from influences of the outside world — was *not* deemed to be an Establishment of religion. Indeed, there is a certain irony in the Respondents' endorsement argument since, in the present case, unlike *Yoder*, if Chapter 748 is upheld, Satmar Hasidic children will actually be integrated into a secular learning environment that will enable them to function in the outside world, notwithstanding Satmar Hasidim "separationist" doctrine. Petitioner's Reply Memorandum on the Petition for Certiorari

¹³ 406 U. S. 205 (1972).

at 7. Moreover, in cases such as this — involving the lifting of government burdens on the free exercise of religion — “a reasonable observer would take into account the values underlying the Free Exercise Clause in assessing whether the challenged practice convey[s] a message of endorsement.” *Allegheny County v. Greater Pittsburgh ACLU*, 492 U. S. at 632 (O’Connor, J. concurring). The accommodation here is thus incidental, if at all related, to the Satmar Hasidic faith.

Thirdly, neither the State, nor this Court should accept the Respondents’ invitation to inquire into the norms of the Satmar Hasidim. The greater the inquiry into the religion, the more likely the transgression into foreign precincts outside the Court’s legitimate concern. *United States v. Ballard*, 322 U. S. 78 (1944). It cannot be gainsaid that the Satmar Hasidic religion is founded on sincerely-held beliefs (*id.*) and that “[a] way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.” *Wisconsin v. Yoder*, 406 U. S. 205, 224 (1972).¹⁴

Finally, the means selected by the State of New York to provide for the education of handicapped Satmar Hasidic children have resulted in the education of the children at a “neutral site” of the type approved by this Court in *Wolman v. Walter*, 433 U. S. 229, 246-247 (1977) — a “practical response to the logistical difficulties of extending needed and desired aid to all the children of the community.” *Id.* at 247, n. 14. Moreover, there is nothing in the record to suggest that operation of the Kiryas Joel school system advances Satmar Hasidic religious interests or otherwise inculcates religious indoctrination, except

¹⁴ *Amicus curiae* joins in the Petitioners’ objection to Respondents’ “dubious factual assertions” that “seek to besmirch the Satmar Hasidim by associating them with practices that seem strange and unacceptable in the modern world.” Petitioner’s Reply Memorandum, at 2. Needless to say, it is just such “strange and unacceptable” practices which the First Amendment is designed to protect.

other than incidently as a neutral and permissible accommodation of problems related to their religious practices.¹⁵

Perhaps most revealing in the present case is the Affidavit of Dr. Steven M. Benardo, a twenty-year veteran of the New York City Public School System with ten years of direct experience in education for the handicapped, who is also an expert in bilingual-bicultural education and the Superintendent of Schools of the Kiryas Joel School District. Monroe-Woodbury Appendix, 115a-116a. Notably, Dr. Benardo is "not a member of the Satmar Hasidic community or any other Orthodox Jewish group." He offered the following observations:

- He was never questioned by the Kiryas Joel Board of Education about his religious affiliation or religious practices. (*Id.* at 117a).
- All teachers in the Kiryas Joel School District are licensed by the State, were hired without regard to their religious affiliation, reside outside the Village and do not teach in religious schools. (*Id.* at 117a).

¹⁵ Chapter 748 would also pass muster under the tri-partite *Lemon* test if that test were employed in this case. Chapter 748 meets this Court's application of *Lemon* principles in the similar case of *Wolman v. Walter*, 433 U. S. 229 (1977). First, the purpose of providing education for the handicapped is clearly a legitimate secular purpose, disproving any allegation that the enactment was "motivated *wholly* by a [religious] purpose." *Bowen v. Kendrick*, 487 U. S. at 602. Moreover, the purpose of the Satmar Hasidim in seeking the enactment was to alleviate psychological and emotional trauma for their children in attending neighboring schools. *Grumet v. Board of Education*, 592 N.Y.S.2d 123, 135 (A.D. 3 Dept. 1992) (Levine, J. dissenting).

Second, Chapter 748 does not have the impermissible primary effect of advancing religion because the education that is offered (a) is special, not general, in nature, (b) is secular in its subject matter, (c) is provided in a neutral secular setting and (d) is taught by secular instructors. *Wolman v. Walter*, *supra*. Chapter 748 also lifts a substantial burden on the Free Exercise of the Satmar Hasidic faith. In these circumstances, an objective observer would not recognize the enactment as an endorsement of the

- The public school building is not located adjacent to any synagogue, religious school or other religious institution or structure and there are no religious symbols or artifacts anywhere in the building on the walls or in the classrooms. (*Id.* at 118a).
- The program of instruction is entirely secular without religious training altogether, designed and approved in the same manner as any other public school district in the state of New York. (*Id.* at 118a).
- The school calendar is similar to that of other New York public schools and is approved by the Department of Education. (*Id.* at 118a).
- Instruction is done by male and female instructors to mixed classes of male and female students without any dress code for either. (*Id.* at 118a-119a).
- English is the primary language of instruction, supplemented with educationally appropriate bilingual and bicultural instruction. (*Id.* at 119a).

religion. *Wallace v. Jaffree*, 472 U. S. 38, 76 (1985)(O'Connor, J. concurring). The argument that the New York enactment has created "a symbolic union" of church and state simply does not apply in the context of a law that is neutral on its face with a secular purpose of providing secular instruction through secular employees at a neutral site, let alone in the context of a neutral, permitted accommodation.

Finally, there is no impermissible "entanglement" because there is no sectarian/secular surveillance or monitoring problem. The program has no religious teaching or administration and thus does not present the typical surveillance or monitoring concerns found with religious institutions. As in *Aguilar v. Felton*, 473 U. S. 402 (1985), the present record indicates that the program operates in a secular fashion governed by secular rules devoid of religion. *Id.* at 428-29. Thus, "efforts to prevent religious indoctrination. . . have been adequate and have not caused excessive institutional entanglement of church and state." *Id.* at 429. Any potential for political divisiveness is remote: the neighboring Monroe-Woodbury School District has supported the enactment of Chapter 748.

- The school has accepted, based on the recommendations of other school districts, numerous non-Satmar students whose language and cultural needs could not be met by their own school districts. (*Id.* at 121a).

Dr. Benardo's observations are fully confirmed in the Affidavit of Philip R. Paterno, Director of Pupil Personnel Services for the Monroe-Woodbury Central School District. *Id.* at 110a-113a. Mr. Paterno concludes his Affidavit by stating remarkably that "I regard the school as a secular institution, staffed by public employees performing the public function of educating children." *Id.* at 113a.

CONCLUSION

Just as this Court rejected the Establishment Clause claims in *Board of Education v. Allen*, 392 U. S. 236 (1967), it should for the same reasons reject the *facial* claim in this case. Like *Allen*,

[T]his case comes. . . after summary judgment entered on the pleadings. Nothing in the record supports the proposition [advanced by the Petitioners]. No evidence has been offered about particular schools, particular courses, particular teachers, or particular books. We are unable to hold, based *solely on judicial notice*, that this statute results in unconstitutional involvement of the State with religious instruction or that the [statute] for this or the other reasons urged, is a law respecting the establishment of religion within the meaning of the First Amendment.

Id. at 248 (emphasis added). Absent proof of invidiously discriminatory intent, this Court should not (to paraphrase Justice O'Connor) "deprive the [Hasidim children] of a program that offers a meaningful chance at success in life. . . on the untenable theory that public school teachers (most of whom are of different faiths than their students) are likely to start teaching religion

merely because they have walked across the threshold of a . . . school [operated by a public school district in a homogenous religious community]." *Aguilar v. Felton*, 473 U. S. at 431 (O'Connor, J. dissenting). This Court should not yield to the commands of purported constitutional doctrine that would ignore the power of a legitimately constituted political community to provide secular educational services at a *neutral* site without inflicting any demonstrated harm or injury in any quarter. It would likewise be a grave mistake to sanction a *per se* invalidation of a governmental subdivision solely because of the religious homogeneity of its political community. Instead, this Court should require Respondents to *prove* that Chapter 748 was enacted intentionally with the purpose of discriminating invidiously on the basis of religion and that the operation of the Kiryas Joel school system has placed a demonstrated disability or burden on persons by reason of their religion.

James Madison, the architect of the Religion Clauses, was all too aware of the need to protect the rights of those whose religious values seemed unusual or out of the ordinary. "Outside the jail in Orange, Virginia, he witnessed an imprisoned Baptist minister preach from the jailhouse window" and decried such persecution, writing to a friend "to pity me and pray for Liberty of Conscience [to revive among us]." Daniel L. Driesbach, *Real Threat and Mere Shadow* 136 (1987). It was his primary concern, notwithstanding near descendants who subscribed to the religion of the State Church of England, to protect the rights of dissenters and to guarantee the individual liberties retained by the governed to order their lives in accordance with their own values and principles.

The State of New York follows in that historical tradition of tolerance in its modern day effort to accommodate, in neutral fashion, a discrete, insular religious minority to provide educational services to handicapped children. In the absence of evidence of purposeful and adverse discrimination against other

persons or groups, or some other showing of impermissible prescription or proscription of religious teaching or practice, or the funding of religious churches or organizations, the *neutral* means selected here by the State of New York should not be deemed *per se* to be a violation of the First and Fourteenth Amendments and should be upheld against facial constitutional attack.

Respectfully submitted,

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RECORD OF THE COURT

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE
SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

On Writ of Certiorari to the
New York Court of Appeals

**BRIEF AMICUS CURIAE OF THE
UNITED STATES CATHOLIC CONFERENCE
IN SUPPORT OF PETITIONERS**

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**BRIEF *AMICUS CURIAE* OF THE
UNITED STATES CATHOLIC CONFERENCE
IN SUPPORT OF PETITIONERS**

INTEREST OF *AMICUS*

The United States Catholic Conference advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity, the rights of parents and children, the sanctity of life, and the importance of religious communities. Values of particular importance to the Conference are the protection of the first amendment rights of religious organizations and their adherents, and the proper development of this Court's Religion Clause jurisprudence.

This case offers this Court an opportunity to speak authoritatively on several important issues. First, the case allows for serious consideration of the Court's Establishment Clause jurisprudence which, both in substance and in process, has failed to serve the history and purpose of the first amendment. Second, by its decision here, the Court can indicate its willingness to continue proper deference to legislative accommodations that serve the public interest and protect religious values. Third, and most importantly, this Court can meaningfully advance the welfare of special needs children by endorsing appropriate ways to advance their education consistent with their parents' religious and cultural values.

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

A hallmark of this Court's jurisprudence over the last several years has been increasingly to highlight the role of legislatures in resolving difficult societal problems. Whether on the subject of abortion, or in the area of church/state relations, or some similar topic, this Court has encouraged legislatures to seek solutions to the more

contentious problems facing this country. *See, e.g., Webster v. Reproductive Health Services*, 492 U.S. 490, 521 (1989); *Employment Division v. Smith*, 494 U.S. 872, 890 (1990). This Court has promised such legislative actions will not be disturbed on judicial review unless they plainly contravene some clear constitutional mandate. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1809).

This case presents just such a legislative measure aimed at solving a complex problem facing the State of New York. 1989 N.Y. Laws, Chapter 748. This act of the Legislature was made necessary as much by this Court's confused Establishment Clause jurisprudence as by the conduct of the parties to this litigation. In *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), this Court removed governmental remedial education programs from the premises of religious schools on the ground that such programs *might* advance religion in violation of the Establishment Clause of the first amendment. Those cases disenfranchised not only the very children who need remedial education, but also the special needs children of the Village of Kiryas Joel. *Aguilar* and *Grand Rapids* put at risk prudent and reasonable accommodations made by legislatures for the sake of their citizens, accommodations that respect religious needs but do not impair values protected by the Establishment Clause. Those cases effectively reversed the traditional presumption of constitutionality to which legislative actions are entitled and jeopardized accommodations, that, by their purpose and effect, do not remotely infringe constitutional guarantees. By doing so, *Aguilar* and *Grand Rapids* exacerbated the problems inherent in judicial attempts to apply this Court's 1971 tripartite test of purpose, effect, and entanglement. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

In a very real sense then, this case was an inevitable consequence of the way this Court has allowed its Establishment Clause jurisprudence to develop, including under the *Lemon* test. But more than that, *Aguilar* and *Grand Rapids* have been used in this case to create a suspicion

that the New York Legislature was intentionally singling out religion for a special benefit. *Grumet v. Bd. of Educ. of Kiryas Joel Village School Dist.*, 81 N.Y.2d 518, 526-31 (1993). Some have therefore demanded that Chapter 748, which is facially neutral toward religion, be strictly scrutinized and narrowly construed in order to avoid an unconstitutional result. *Id.* at 532-40 (Kaye, C.J., concurring). Although this Court need not and should not allow accommodations of religion to meet with such suspicion, the fact is that Chapter 748 survives even such studied review. Chapter 748 furthers compelling interests by providing for the education of disabled children, protecting the legitimate religious beliefs and practices of citizens without offense to anyone, and protecting the rights of parents to educate their children. Several alternative means of serving these interests were considered and rejected by the New York courts in reliance on this Court's opinions in *Aguilar* and *Grand Rapids*. The action taken by the Legislature is therefore narrowly tailored to solve this seemingly intractable problem.

Aguilar and *Grand Rapids* were the underlying cause for special educational services being withdrawn from disabled children attending the Kiryas Joel Village schools. Those opinions have served not only to create the legal and political puzzle presented here, but also to diminish the educational services provided to countless needy children, in public and private schools, who pay for that loss in their daily lives. But for those decisions, the children of Kiryas Joel, and thousands of others across this nation, would receive needed secular educational services in their own schools. This *amicus* urges the Court to reconsider and abandon *Aguilar* and *Grand Rapids* in order finally to resolve the problem presented here and forestall future occurrences of such unfortunate and unnecessary litigation.

ARGUMENT

I. NEW YORK'S CHAPTER 748 IS A PERMISSIBLE AND NECESSARY ACCOMMODATION OF RELIGION UNDER THE ESTABLISHMENT CLAUSE.

This case presents the issue of whether a legislature may create a secular school district in a community consisting almost exclusively of citizens of the same religious group. Even though the respondents and the lower courts made the religion of the citizens of the Village and of the public school board the core issue, this case does not involve a prohibited "religious gerrymander." *Walz v. Tax Commission*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring). Instead this case presents a legitimate accommodation made necessary by a number of factors. The strongly held religious values of the Village citizens, the State's insistence that special education could only occur in public schools outside the Village, and the lack of clarity in this Court's jurisprudence each contributed to the need for this Court now to resolve the matter finally.

The course of this dispute pitted State and local educational authorities against the citizens of the Village of Kiryas Joel for over eight years. Those citizens, Satmar Hasidic Jews, educate their children, to the extent possible, in religious schools. But there are approximately 150 children in Kiryas Joel who suffer from mental retardation, deafness, spina bifida, emotional disorders, speech and language impairments, and other conditions, whose special education needs are the joint responsibility of their parents and of the State. Notwithstanding this Court's decisions in *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985),¹ the parents expected that special

¹ The educational program at issue in *Aguilar v. Felton* was Chapter 1 of the Education Consolidation and Improvement Act of 1981. 20 U.S.C. § 3801 *et seq.* That Act provided, among other things, remedial reading and mathematics for students who were both educationally and economically disadvantaged. For nineteen years, the program functioned on the premises of both public and private schools; it was never part of the curriculum of private

education of those children would continue in the Village. After *Aguilar and Grand Rapids*, the State took the position that such education could only occur in public schools, which were located outside the Village. Not surprisingly, the parents did not believe that solution consistent with their historic, cultural or religious values, or with their children's needs.

Litigation between the parents and educational authorities failed to resolve the impasse to anyone's satisfaction. The New York courts ultimately ruled that neither of the solutions proffered by the parties was mandated and strongly suggested a compromise be sought. *Board of Education v. Wieder*, 72 N.Y.2d 174 (N.Y. 1988). At that point the Legislature intervened, passing a law that created the petitioner Board of Education and enabling it to erect public schools in the Village to facilitate general education. 1989 N.Y. Laws, Chapter 748. Those children who are able attend the private religious schools in the Village; those having special needs now attend the public school. Why this solution, which works to everyone's benefit, should be challenged as constitutionally suspect under the Establishment Clause ~~is~~ difficult to square with the first amendment's history and meaning, or with this Court's encouragement that legislatures accommodate religion.

schools and was expressly designed by the Congress to be an aid to students, not to the schools. After both a three-judge court and a district court upheld the program, the U.S. Court of Appeals for the Second Circuit invalidated the program as violative of the Establishment Clause. *Felton v. Secretary, U.S. Dep't of Education*, 739 F.2d 48 (2d Cir. 1984). At the same time, the panel lamented that the program had done "much good and little, if any, detectable harm." *Id.* at 72. On July 1, 1985, in two 5-4 decisions, this Court invalidated the New York Chapter 1 remedial education program and struck down a similar Grand Rapids School District program. *Aguilar v. Felton*, 473 U.S. at 408-14 (invalidating the New York program); *School District of Grand Rapids v. Ball*, 473 U.S. at 381-98 (invalidating the Grand Rapids program).

A. The History And Meaning Of The Establishment Clause.

Through the Religion Clauses, the Framers of our Bill of Rights attempted to protect two important values. First, they were concerned about the derogation of individual *religious liberty* if the State could sponsor particular religions or religious activity, to the exclusion or detriment of others. See *Lee v. Weisman*, 112 S. Ct. 2649, 2667, 2668-70 (1992) (Souter, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 91-106 (1985) (Rehnquist, J., dissenting). The Framers also sought to protect *institutional autonomy* of government and religious institutions. "The objective [was] to prevent, as far as possible, the intrusion of either [a State or a Church] into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). In doing so, they denied to churches the ability to interfere in the operation of government or the exercise of the power of governance. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982). So too, they denied to government the authority to dictate to the churches how religion should be taught, practiced or governed. E.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Where neither value is implicated, the Establishment Clause is not in danger of infringement. See *Zobrest v. Catalina Foothills School District*, 113 S. Ct. 2462 (1993).

This Court has also recently confirmed that legislatures, not the courts, should be encouraged to draw lines that accommodate religion. *Employment Division v. Smith*, 494 U.S. 872, 890 (1990). What the Court has forbidden to legislatures is government "sponsorship, financial support, and active involvement" with religion. *Walz v. Tax Commission*, 397 U.S. at 668. What constitutes "sponsorship, support, or involvement" depends on the facts of a particular case. However, there is a "gray area" between the limits of the Establishment Clause and the commands of the Free Exercise Clause, what the Court has described as "*room for play in the joints* productive of a benevolent neutrality which will permit

religious exercise to exist without sponsorship and without interference.” *Id.* at 669 (emphasis added). Government may go further than that which is commanded by the Free Exercise Clause to accommodate religion without running afoul of the Establishment Clause. *Id.* at 673 (citations omitted). Such accommodations are upheld because it is a demonstrated part of our history and tradition that government will adjust itself, if possible, to allow citizens to enjoy untrammelled religious expression. To rule otherwise would call into question a number of accommodations this Court has acknowledged and validated over the last fifty years. *E.g.*, *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334, 340 (1987) (upholding religious exemption to Title VII of the Civil Rights Act of 1964); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144-45 (1987) (providing unemployment compensation benefits to Sabbath observer does not violate the Establishment Clause).²

“[T]he Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government.” *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). The Clauses were included in the Bill of Rights “not as a protection *from* religion, but rather as a protection *for* religion. They were inserted in our Constitution largely because its framers felt that they were important to insure the continuance and the strengthening of religion, which could not flourish under

² That Congress may choose whether to include or exempt persons from a statute on religious grounds as an accommodation is well established. *United States v. Lee*, 455 U.S. 252, 260-61 (1982); *Bowen v. Roy*, 476 U.S. 693, 712 (1986) (Burger, C.J.). That choice does not violate the Establishment Clause. *Bowen v. Roy*, 476 U.S. at 712 n.19; *Sherbert v. Verner*, 374 U.S. 398, 409 (1963). Likewise in an appropriate case, the government may exercise its discretion to limit accommodation to preserve desired neutrality without violating the Religion Clauses. See *Norwood v. Harrison*, 413 U.S. 455, 462 (1973).

American conditions if any State Church were either provided for or tolerated." A. Stokes, *I Church and State in the United States*, 556 (1950) (emphasis in original). As explained above, in deciding whether the Establishment Clause has been infringed, a court must be firmly convinced that the government has taken action clearly incompatible with the purposes and intent of the Clause as revealed through history and experience.

Over forty years ago, this Court held that government cannot exclude individuals from the benefits of public welfare legislation because of their faith, or lack of it. *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). The Court cautioned that "we must be careful, in protecting . . . against state-established churches, to be sure that we do not inadvertently prohibit [a State] from extending its general State law benefits to all its citizens without regard to their religious belief." *Id.* at 16. Government must be neutral on religion and religious matters, not antiseptically so, but benevolently neutral, to allow for religious actions "without sponsorship and without interference." *Walz*, 397 U.S. at 669; see *Presiding Bishop v. Amos*, 483 U.S. at 335. A central theme in this jurisprudence is that accommodation of religious values is important to a free society. *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952). Legislatures are entitled to the benefit of the doubt unless it is clear that the challenged action is plainly incompatible with the Establishment Clause. Applying these historical principles to the law being challenged in this case, the creation of the Kiryas Joel School District passes constitutional muster.

B. The Creation Of The School District Is A Legitimate Accommodation Of Religion.

In creating the petitioner school district, the Legislature advanced a particular State interest, the education of special needs children. Those children were not attending available classes in the pre-existing public school district, in part, because of their parents' decision that the values expressed in the unique religious and cultural setting of

the Village were superior to the educational experience elsewhere. *Cf. Zobrest v. Catalina Foothills*, 113 S. Ct. at 2464, 2469 (parents' choice of religious school takes precedence). In addition, travelling to public schools outside the Village to obtain special educational services is disruptive to the educational process. It is also undisputed that the children themselves were ridiculed by other children attending the public school, causing further disruption to their education. *Grumet*, 81 N.Y.2d at 524. When confronted with this situation, the Legislature, to its credit, found a workable political solution. *Id.* at 524-25. Such an action would seem well within its role as arbiter of difficult and complex social questions, especially since deference to the legislative judgment, not judicial second-guessing, is well established. *E.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130-31 (1809); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 113 S. Ct. 2217, 2239-40 (1993) (Scalia, J., concurring). Yet the appellate courts of New York chose not to defer to the State Legislature. Instead they attributed to the Legislature an intention to spend state resources to advance religion, a conclusion supported by nothing more than speculation.

Even if this Court were now to examine the supposed religious effects of Chapter 748, that law should still be ruled a legitimate accommodation of religion. In *Employment Division v. Smith*, this Court recognized—some would say encouraged—legislative accommodations such as Chapter 748. There, the Court refused to create a judicial exception to a law of general applicability, but noted “a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.”³ 494 U.S. at 890. Having encouraged legislative action to protect religious values, this Court must now affirm that it meant what it said. Such accommodations are legitimate, even mandated expressions of legislative authority.

³ See, e.g., Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141 (1993).

The Establishment Clause was never intended to demand "hermetic separation." *Roemer v. Board of Public Works*, 426 U.S. 736, 745-46 (1976) (plurality). Legislatures are permitted to consider religion as one of the many values they must balance in resolving disputes. *Presiding Bishop v. Amos*, *supra*. Merely because a statute arguably results in some benefit to religion does not mean it must automatically be invalidated. *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). Rather, the legislation must be carefully scrutinized "to determine whether, *in reality*, it establishes a religion or religious faith, or tends to do so." *Id.* (emphasis added). In this case, the law in question undoubtedly relieves a burden on the strongly held religious values of the Satmar Hasidic community. It does not risk denial of any individual's religious liberty; it requires no religious observance or even toleration. *Lee v. Weisman*, 112 S. Ct. at 2657-58. It allows only for self-government of a school district. It does not involve the State in religious matters, or cause religious dominance of secular government, so as to implicate the autonomy of either institution. *See Larkin v. Grendel's Den, Inc.*, *supra*. It does not, therefore, deserve to be treated as anything other than a valid exercise of legislative judgment.

**C. This Court's Establishment Clause Jurisprudence
Contributes To Uncertainty About The Validity Of
Legislative Action.**

This Court has correctly insisted that the Establishment Clause be construed according to "what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 465 U.S. at 673. This accords with the well established view that the Court will construe the Constitution reasonably, taking words "in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816). Ultimately, "every clause in every constitution . . . must have a reasonable interpretation, and be held to express the intention of its framers." *Woodson v. Murdock*, 89 U.S. (22 Wall.) 351, 369 (1874).

Rather than sift facts and weigh circumstances in deciding whether an establishment of religion had actually occurred in this case,⁴ the lower court struggled with the application of the tripartite purpose, effect, and entanglement test. *Lemon v. Kurtzman*, 403 U.S. at 612-13. In doing so, the court dramatically illustrated the difficulty both with this Court's substantive Establishment Clause case law and with the process by which this Court has addressed such questions. The court struggled initially over the question whether the *Lemon* test had been abandoned. *Grumet*, 81 N.Y.2d at 526-27; *id.* at 532 n.1 (Kaye, C.J., concurring), 549-50 (Bellacosa, J., dissenting). That analysis was necessitated by this Court's insistence that this "test" may be nothing more than a "signpost." *Larkin v. Grendel's Den, Inc.*, 459 U.S. at 123. In addition, no particular formulation of the test is so embedded in the Court's doctrine that it must be reflexively applied in every case. *Lynch v. Donnelly*, 465 U.S. at 678. Accordingly, whenever this Court applies, or does not apply, the *Lemon* test according to the dictates of changing majorities,⁵ it contributes to the uncertainty that that test, some other test,⁶ or no test⁷ is now

⁴ See Glendon, *Law, Communities, and the Religious Freedom Provisions of the Constitution*, 60 Geo. Wash. L. Rev. 672, 678-81 (1992).

⁵ Cf. *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141, 2148 & n.7 (1993), with *Zobrest v. Catalina Foothills School District*, 113 S. Ct. at 2464-69 (resolution of Establishment Clause claim without reference to *Lemon* only eleven days after deciding in *Lamb's Chapel* to retain the *Lemon* test).

⁶ Justice O'Connor has offered an "endorsement" test as the measure of an Establishment Clause violation. *Lynch v. Donnelly*, 465 U.S. at 688 (O'Connor, J., concurring). Justice Kennedy has suggested that "coercion" is a necessary ingredient of a violation. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 655, 660-61 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Justices Scalia and Kennedy offered a different measure in a concurring opinion in *Bowen v. Kendrick*, 487 U.S. 589, 624 (1988) (Kennedy, J., concurring, joined by Scalia, J.).

⁷ *Marsh v. Chambers*, 463 U.S. 783 (1983); *Lee v. Weisman*, *supra*; *Zobrest v. Catalina Foothills School District*, *supra*.

the preferred means by which courts should adjudicate Establishment Clause questions. More to the point, the continuing criticism of the test by members of this Court⁸ and by commentators⁹ adds to this level of judicial uncertainty.

As currently conceived, this test constitutes a warrant for judges to stray far beyond their proper role and explore the motivations of legislatures; study the far corners of a particular action for some effects, real or imagined; or decide, subjectively, whether some particular involvement is "excessive."¹⁰ After this Court's 1985 decision in *Aguilar v. Felton*, there seemed little doubt that the test was in many respects an excuse for applying a presumption of invalidity to legislative actions involving both government and religious entities.¹¹ Indeed, this case, which demonstrates only the involvement of a legislature resolving a political problem, is more than adequate illustration of the nature of the difficulties with this Court's Establishment Clause jurisprudence. More particularly, as discussed below, continuing efforts by lower courts to interpret and apply *Aguilar v. Felton* and *Grand Rapids v. Ball* will result only in more difficulties in the law and in the lives of citizens.

⁸ See, e.g., *Aguilar v. Felton*, 473 U.S. at 426-30 (O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. at 108-13 (Rehnquist, J., dissenting).

⁹ See Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 Geo. Wash. L. Rev. 645, 654-60 (1992); Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L. J. 409, 449-50 (1986). This *amicus* has, on numerous occasions, been critical of the *Lemon* test and urged its reformulation or abandonment. E.g., Brief *Amicus Curiae*, in *Aguilar v. Felton*, No. 84-237 (1984).

¹⁰ Chopko, *Religious Access*, *supra* note 9.

¹¹ Glendon and Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 514 (1991).

II. NEW YORK'S CHAPTER 748 IS NARROWLY TAILORED TO SERVE COMPELLING CONSTITUTIONAL INTERESTS.

Over the last several years, this Court has begun to approach first amendment religion cases in a slightly different framework. The Court has examined the nature of the particular governmental action to see whether it singled out religion for some special benefit or detriment. Where religion was found not to have been accorded special treatment, the Court has not required heightened scrutiny. *Employment Division v. Smith, supra*. Where such special treatment was evident, the Court has looked with greater scrutiny and required the state to justify its action in greater detail. Indeed, this theme may be seen to link the three religion cases decided by the Court during the last Term. In *Lamb's Chapel, supra*, a school district allowed community groups to use school property unless they expressed a religious message. In *Church of Lukumi Babalu Aye, supra*, the City of Hialeah legislated against killing animals only if done as religious sacrifice. And in *Zobrest, supra*, a deaf student was excluded from benefits under the same federal program at issue in this case—the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*—only because he attended a religious school. Of particular importance, in *Zobrest* this Court noted that the Establishment Clause has never been held to invalidate a general governmental program that neutrally benefits individuals solely because the program may also provide some indirect benefit to religion or religious institutions. 113 S. Ct. at 2466-69. Because the IDEA distributes benefits neutrally to any qualifying child without regard to the nature of the school, religious or otherwise, the child attends, the State could not justify its refusal to pay for a sign-language interpreter for a deaf student attending a Catholic high school under that Clause. *Id.*

By contrast, the lower court in this case concluded that the creation of a school district in Kiryas Joel was not part of a general governmental program and did not neu-

trally confer benefits on the citizens of the Village. *Grumet*, 81 N.Y.2d at 530. The majority below implies that this alone is sufficient to find the law constitutionally suspect. In a concurring opinion, however, Chief Judge Kaye noted that such a conclusion does not automatically invalidate the law, it simply requires the application of a strict scrutiny analysis. *Id.* at 532-40. Under this analysis, Judge Kaye found that Chapter 748 was motivated by a compelling state interest (education of disabled children) but was not narrowly tailored to achieve that purpose. *Id.* at 532, 536-39. The first phase of Judge Kaye's analysis is correct—the New York law serves several compelling interests. What Judge Kaye failed to acknowledge is that, when faced with trying to apply this Court's opinions in *Aguilar v. Felton* and *Grand Rapids v. Ball*, the solution adopted by the State of New York is narrowly tailored and constitutionally sound.

A. Chapter 748 Serves A Combination Of Compelling State Interests.

No one disputes that Chapter 748 was enacted for the primary purpose of providing special educational services to disabled children, services that they are legally entitled to receive under the IDEA.¹² Likewise, there is no dispute, indeed it is generally assumed, that providing such special education to all children in need is a high and worthy goal of government. Chapter 748 also protects both first amendment rights and the rights of parents to direct the education of their children. Protection of those rights buttresses the conclusion that the law is a legitimate exercise of legislative authority.

¹² There is no pretense, on the one hand, that the creation of the separate school district was for general administrative or budgetary reasons, nor is there any allegation, on the other hand that the State is trying to advance the growth of Satmar Hasidism among its Jewish citizens. The resolution of the dispute between Kiryas Joel and the Monroe-Woodbury School District—a dispute that was preventing children from receiving much needed services—was the clear reason for the passage of Chapter 748. *Grumet*, 81 N.Y.2d at 523-25.

1. Advancement Of Equal Educational Opportunities To Children With Disabilities.

Education of the handicapped is a national priority in part because of this Court's pronouncement that: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . is a right which must be made available to all on equal terms." This passage from *Brown v. Board of Education* 347 U.S. 483, 493 (1954), was quoted by the United States Senate when the Education for All Handicapped Children Act of 1975 (EHA) was adopted. S. Rep. No. 94-168, 94th Cong., 1st Sess. 6, reprinted in, 1975 U.S. Code Cong. & Ad. News 1425, 1430. In 1990, when the EHA was retitled the Individuals with Disabilities Education Act, Congress declared: "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law." 20 U.S.C. § 1400(b)(9). This purpose, to eliminate the discriminatory treatment of children with disabilities, also underlies the enactment of Chapter 748 by New York State.

From the time of this Court's decisions in *Aguilar* and *Grand Rapids* until the State of New York finally stepped in to resolve the dispute between the Village and the neighboring Monroe-Woodbury School District, the children of Kiryas Joel were not being treated equally but were in fact being subjected to disparate treatment precisely because of their religious practices. Just as the Orthodox Jew in Pennsylvania was subjected to a "cruel choice" between "his religious faith and his economic survival" by that State's Sunday-closing law, so too the parents of disabled children in Kiryas Joel have been forced into a "cruel choice" between their religious faith and their children's education.¹³ *Braunfeld v. Brown*, 366

¹³ It was exactly this type of callous treatment that Congress thought it was abolishing when it enacted the EHA:

U.S. 599, 616 (1961) (Stewart, J., dissenting); *see also* *Goldman v. Secretary of Defense*, 739 F.2d 657, 660 (D.C. Cir. 1984) (Ginsburg, J., dissenting from denial of suggestion to hear case *en banc*), *aff'd*, 475 U.S. 503 (1986). Chapter 748 resolves this "choice" in a way that provides for special education without infringing religious values. Resolving the political problem to provide equal educational opportunities furthers a compelling interest.

2. Accommodation Of Religious Values And Parental Rights.

The first of the constitutional mandates served by the creation of the Kiryas Joel School District is the free exercise of religion. That government action accommodating the citizenry's right to engage freely in religious practice is an "interest[] of the highest order" cannot be disputed. *Church of Lukumi Babalu Aye*, 113 S. Ct. at 2233. It is indeed "'the best of our traditions' to 'accommodate[] the public service to the[] spiritual needs [of our people].'" *Goldman*, 739 F.2d at 660 (Ginsburg, J., dissenting, quoting *Zorach v. Clauson*, 343 U.S. at 314). Indeed, as this Court has noted, protection of religious freedom predates "general acknowledgment of the need for universal formal education. . . . The values underlying [the Religion Clauses] have been zealously protected, sometimes even at the expense of other interests of admit-

This Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue.

Parents of handicapped children . . . have begun to recognize that their children are being denied services which are guaranteed under the Constitution. It should not, however, be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy.

S. Rep. No. 94-168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1433.

tedly high social importance." *Wisconsin v. Yoder*, 406 U.S. at 214. Therefore, if the creation of the new school district is viewed to benefit the religious practices of Hasidic citizens, such government action clearly serves the compelling state interest in the free exercise of religion.¹⁴

Moreover, since at least the 1920s, this Court has recognized that the right of parents to direct the education of their children is constitutionally protected. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In *Yoder*, this Court went even further, indicating that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." *Yoder*, 405 U.S. at 223. This special constitutional significance to the combination of free exercise and parental rights, or "hybrid situation," was reiterated in *Smith* where the Court indicated that even neutral laws of general applicability must face strict scrutiny when they restrict such a constitutionally powerful combination. 494 U.S. at 881 n.1. That same hybrid of free exercise rights and the rights of parents to direct the upbringing of their children has been at risk since this Court's decisions in *Aguilar* and *Grand Rapids* caused the loss of special education services to the disabled children of the Village. Those rights are vindicated in Chapter 748.

As the above discussion indicates, since neutral, generally applicable laws *restricting* hybrid rights must undergo strict scrutiny, then laws thought not to be neu-

¹⁴ Accommodations of religion need not and should not be strictly scrutinized, as discussed in Argument I. The view of the lower court was that the Legislature perhaps unwittingly provided some religious benefits to the citizens of Kiryas Joel that should trigger additional scrutiny. It must be emphasized that this type of legislation is unlike the kinds of action that concerned the Court, for example, in *Lee v. Weisman*. Here no one is being coerced, directly or indirectly, to participate in or even tolerate *any* religious exercise or observance. 112 S. Ct. at 2655, 2657-58.

tral or generally applicable, but which *accommodate* hybrid constitutional rights, should undergo only a "reasonable relation" test in order to be upheld by this Court. *Yoder*, 406 U.S. at 213-36; *Smith*, 494 U.S. at 876-90. Nevertheless, since Chapter 748 also serves compelling interests and is narrowly tailored, its constitutionality cannot be doubted under either standard of review.

B. Chapter 748 Is A Narrow And Reasonable Response To This Court's Opinions In *Aguilar* And *Grand Rapids*.

In her concurring opinion below, Chief Judge Kaye concludes that Chapter 748 was not narrowly drawn because the Legislature could have just simply "enacted a law providing that the Monroe-Woodbury Central School District should furnish special education services to these children at sites not physically or educationally associated with their parochial schools." *Grumet*, 81 N.Y.2d at 538-39 (Kaye, C.J., concurring). Such a seemingly simple solution, however, ignores this Court's overreaching opinions in *Grand Rapids* and *Aguilar*, as well as the actual conduct of Monroe-Woodbury and the New York courts in reliance on those opinions. Chief Judge Kaye also misapprehends the importance of this Court's decision in *Zobrest*, decided just three weeks before the opinion below.

From the record below, one sad fact is abundantly clear:

Prior to the decision of the United States Supreme Court in *Aguilar v. Felton* [citation omitted], the handicapped children living in Kiryas Joel received special education services from Monroe-Woodbury Central School District personnel in an annex to one of the Kiryas Joel religious schools.

* * * *

In response to the *Aguilar* decision, the Monroe-Woodbury Central School District stopped providing the special education programs at the religious school annex.

Grumet, 81 N.Y.2d at 523-24. And to make matters worse, Monroe-Woodbury also concluded that, as a result of *Aguilar* and *Grand Rapids*, "it could furnish services to [the] children only in the public schools, and it proceeded to place them there. . . ." *Board of Education v. Wieder*, 72 N.Y.2d at 180. Agreeing with the Monroe-Woodbury School District, New York's Appellate Division relied on *Aguilar* and *Grand Rapids* to require that Village children receive services only "in the regular classes and programs of the public schools and not separately from public school students. . . ." *Board of Education v. Wieder*, 522 N.Y.S.2d 878, 883 (N.Y. App. Div. 1987).¹⁵ Although this latter ruling was later modified by the Court of Appeals, it was in this posture that the matter came before the State Legislature. The legislators were, therefore, faced with a confused situation in which physically separate or mobile sites had been deemed unconstitutional and limiting special services to public schools only, if not constitutionally mandated, seemed at least permissible. The cause of this confusion was *Aguilar* and *Grand Rapids*; the narrowly tailored solution chosen by the Legislature was Chapter 748, the creation of the Kiryas Joel Village School District. Under the circumstances faced by the New York legislators in 1989, it was a reasonable, if not the only, solution.

¹⁵ In the first round of litigation between Kiryas Joel and the Monroe-Woodbury Central School District, the state trial court ordered Monroe-Woodbury to do precisely what Chief Judge Kaye later suggests: furnish special education and related services in a mobile or other appropriate site not physically or educationally identified with but reasonably accessible to the parochial school children. *Board of Education v. Wieder*, 512 N.Y.S.2d 305, 308 (N.Y. Sup. Ct. 1987). Unfortunately, the trial court's order was not long-lived. By the end of the same year, the Appellate Division had ruled that the solution ordered was "constitutionally impermissible." *Board of Education v. Wieder*, 522 N.Y.S.2d at 882. The basis of the Appellate Division's ruling was, of course, *Aguilar* and *Grand Rapids*. *Id.*

C. Overruling *Aguilar* And *Grand Rapids* Would Resolve This Dispute And Prevent Future Cases Such As This From Arising.

1. *Aguilar* And *Grand Rapids* Have Had Detrimental Effects On Numerous Government Programs.

Relying in large measure on *Aguilar* and *Grand Rapids*, the district judge in *Kendrick v. Bowen* concluded that participation of religious organizations in the Adolescent Family Life Act (AFLA)¹⁶ was unconstitutional. 657 F. Supp. 1547, 1561-68 (D.D.C. 1987). This Court reversed and remanded, holding that Congress was within its constitutional discretion to decide that religious organizations could play a meaningful role in the development of services for adolescents. *Bowen v. Kendrick*, 487 U.S. 589 (1988). Charges that the program was being administered in an unconstitutional way such that it invited abusive practices were remanded with the direction that such charges had to be supported by evidence, not conjecture. *Id.* at 620-21. In so ruling, this Court corrected the misguided opinion in *Kendrick*, but did nothing to repair the district judge's twin blind guides—*Aguilar* and *Grand Rapids*—thus contributing to jurisprudential confusion.

In the meantime Congress, concerned about the detrimental effect of the *Aguilar* decision on the education of children most in need of special services, enacted remedial legislation to offset the impact of that opinion. 20 U.S.C. § 2727(d).¹⁷ In addition to what school districts them-

¹⁶ 42 U.S.C. § 300z(a)(8)(B).

¹⁷ The Senate Labor and Human Resources Committee reported: To comply with the Supreme Court's decision [in *Aguilar v. Felton*], schools have had to implement costly, disruptive, and creative procedures to serve private school children.

The Committee strongly believes that these eligible children should be served. Service to eligible private school children has been a provision in law since its enactment in 1965. The Committee is very concerned that efforts to comply with the

selves have spent, since 1988 Congress has appropriated over \$200 million to help defray the cost of capital expenses associated with alternative delivery methods, such as the mobile vans and leases of neutral sites necessitated by *Aguilar*.¹⁸ This money could be better used to provide much needed instructional services to both public and private school students. Instead, the costs for alternative delivery methods decrease the amount of funds available to provide instructional services for all students, regardless of where they attend school. Although plainly beneficial to needy students and cash-starved school districts, this new legislation was just another complaint to add to the lawsuits spawned by *Aguilar/Grand Rapids*.

Much of that new litigation focused on the use of government-owned and controlled mobile vans being used for remedial education classrooms and the methods of cost allocation. A Missouri district court almost immediately invalidated both the parking of mobile vans on school yards, even in places remote from the private school, and the method of accounting for any additional

Supreme Court ruling have resulted in a decline of about 35 percent in the number of private school children who are served.

S. Rep. No. 100-222, 100th Cong., 1st Sess. 14, *reprinted in*, 1988 U.S. Code Cong. & Ad. News 101, 114.

¹⁸ M. Haslam, D. Humphrey, *Chapter 1 Services to Private Religious School Students* (U.S. Dept. of Education, 1993), 41 (approximately \$161 million had been appropriated for capital expenses for fiscal years 1988-93). For fiscal year 1994, \$41.434 million has been appropriated. H.R. Rep. No. 103-275, 103d Cong., 1st Sess. 72 (1993). Perhaps appropriately, the extra costs required to provide remedial education to needy parochial school students as a result of this Court's decision in *Aguilar v. Felton* have become known as "*Felton costs*." These "*Felton costs*" had to be taken off-the-top of a state's allocation of funds in order to provide actual services equitably to all needy students. The focus on costs is important. If these costs were not taken off-the-top of the allocation of Chapter 1 monies, but instead were assessed against the private school students' share of Chapter 1, services might have to be discontinued for a year or more. Many students would be unserved or would simply leave the private schools.

costs to provide these services. *Pulido v. Cavazos*, 728 F. Supp. 574 (W.D. Mo. 1989). Closely reading *Aguilar*, the district court came to the anomalous conclusion that a van parked directly in front of a parochial school, just a few steps from the entrance, but outside the school's property line was constitutional; a van parked across campus, out of sight of the school's entrance, but still on land owned by the school violated the first amendment. *Pulido*, 728 F. Supp. at 587-93. By contrast, a Kentucky district court upheld the delivery of services in off-premises mobile vans but invalidated the method of cost allocation. *Barnes v. Cavazos*, No. C80-0501-L(A) (W.D. Ky. Feb. 21, 1990). On appeal, the Eighth Circuit upheld both the use of mobile classrooms, no matter where parked, and the cost allocation method. *Pulido*, 934 F.2d 912 (8th Cir. 1991). The Sixth Circuit upheld the actual dollar allocation of costs, based solely on the facts in that case, but did not address the van placement issue. *Barnes*, 966 F.2d 1056 (6th Cir. 1992).

A California district court, in yet another *Aguilar/Grand Rapids* progeny, first sided with the trial judge in *Pulido*, concluding that property boundaries have constitutional significance for placement of mobile vans. *Walker v. San Francisco Unified School District*, 761 F. Supp. 1463, 1469-71 (N.D. Cal. 1991). However, the *Walker* court rejected the *Pulido* court's reasoning on the cost allocation issue and aligned itself with those decisions upholding the constitutionality of that method of financing. *Walker*, 761 F. Supp. at 1472. The case is awaiting decision by the Court of Appeals. *Walker v. San Francisco Unified School District*, No. 92-15977 (9th Cir. filed May 21, 1992).¹⁹

That *Aguilar* and *Grand Rapids* caused havoc in the delivery of services to those most in need is demonstrated,

¹⁹ In *Helms v. Cody*, No. 85-5533 (E.D. La. filed Dec. 2, 1985), awaiting rulings on cross motions for summary judgment, plaintiffs challenge the legitimacy of any Congressional consideration of the "Felton" costs (note 18), and the continuation of an on-premises program of instruction for special needs children.

not only by their impact through litigation, but also by their detrimental effect on the administration of governmental programs. For example, as a result of *Aguilar*, participation of private school children in the Chapter 1 program dropped precipitously as school districts scrambled to provide alternative methods to deliver remedial services. Before *Aguilar*, states served about 185,000 private school students. After *Aguilar*, the number declined by 62,000 children.²⁰

In addition to the decline in the quantity of private school children being served, it is generally accepted that the quality of the services is inferior to those provided pre-*Aguilar* and to those provided to public school children. This is, in part, because *Aguilar* and *Grand Rapids* created substantial logistical and educational problems in delivering Chapter 1 services to private school children.²¹ Alternative delivery systems have included mobile vans parked on public streets,²² portable classrooms on neutral sites, public school buildings, and computer assisted instruction in private schools with no instructional personnel present.²³ Requiring private school students to leave

²⁰ General Accounting Office, *Aguilar v. Felton Decision's Continuing Impact on Chapter 1 Program*, (GAO/HRD-89-131BR, 1989) 5. See also note 17, *supra*. While the number of private school students receiving services rebounded, it still has not reached pre-*Aguilar* levels. General Accounting Office, *Additional Funds Help More Private School Students Receive Chapter 1 Services*, (GAO/HRD-93-65, 1993) 3.

²¹ U.S. Department of Education, *Statement of the Independent Review Panel of the National Assessment of Chapter 1* (1993), 57.

²² Students who receive Chapter 1 services in mobile vans have been derisively labeled "kamper kids." A. Russo, M. Haslam, *The Uses of Computer Assisted Instruction in Chapter 1 Programs Servicing Sectarian Private School Students* (U.S. Dept. of Education, 1992) 17.

²³ *Id.* at 57-58. Computer assisted instruction also has its problems. It is not well integrated with regular school programs, frequently neglects staff training and support, and is used primarily for drill and practice in basic skills. *Id.* at iii. The contribution of computer assisted instruction to students' intellectual development and improved achievement is limited. *Id.* at 23.

their regular schools and travel to locations off-site disrupts the educational process, creates safety concerns, and causes undue hardship on the children, particularly when bad weather is involved.²⁴ Dissatisfaction with the available alternative delivery methods is such that, as of 1990-91, in sixteen percent of the school districts, some or all private school officials and parents declined to allow their children to participate in the Chapter 1 program.²⁵

The deleterious effects of *Aguilar* and *Grand Rapids* have not been limited to the Chapter 1 programs. Relying in part on *Grand Rapids*, the Fourth Circuit held, contrary to this Court's decision in *Zobrest*, that it would violate the Establishment Clause for a public school district to provide a cued speech interpreter for a deaf student attending a religious school. *Goodall v. Stafford County School Board*, 930 F.2d 363, cert. denied, 112 S. Ct. 188 (1991). Catholic school educators across the country have reported numerous instances in which public school officials, citing *Aguilar* or *Grand Rapids*, have refused to provide services required by IDEA to students attending religious schools. Other anecdotal evidence includes instances of local governments, again citing *Aguilar* or *Grand Rapids*, refusing to allow police officers to address students in religious schools on the perils of drug abuse. In short, *Aguilar* and *Grand Rapids* have had a restrictive impact on government officials, often resulting in unnecessary limits on the participation of religious organizations and those they serve in programs that are otherwise available to others.

Finally, and most importantly, even for those children who continue to receive services, *Aguilar's* consistent

²⁴ In one example, six second graders received 23 minutes of instructional services from a teacher in a seven foot by twelve foot space in a mobile van. At the end of the instructional time the children put on their coats and their teacher "led them out into the cloudy 10-degree day and across 100 yards of an ice-covered parking lot to return to their school." M. Haslam, D. Humphrey, *supra* note 18, at 23.

²⁵ *Id.* at 17.

detrimental impact is that it exaggerates the disadvantages already inflicted on the class of children most in need of remedial attention. Requiring services to be off-premises adds another layer of disruption to the educational day, requiring children to travel to alternative education sites for their remedial instruction. Such a rule can only further disadvantage these youths and further derogate the public interest in serving this group of children. After all, given the absence of a concrete threat to anyone's religious liberty or to the institutional autonomy that exists between Church and State, the Chapter 1 educational programs do not establish religion. It is a disservice to the public interest to invalidate such programs which promote real educational, economic, and civil rights values in our society, and which do not, except by speculation, establish religion.

2. *Aguilar* And *Grand Rapids* Were Themselves Wrongly Decided.

The Supreme Court long ago held that congressional action should not be invalidated absent "clear incompatibility" with the Constitution. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 530-31 (1871). In its more recent Establishment Clause decisions, this Court has stressed that a declaration of unconstitutionality should not be predicated on mere possibilities, but only when, by realistic measure, the state is directly and substantially involved in religion. *Tilton v. Richardson*, 403 U.S. 672, 679 (1971) (plurality). "[T]he measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *Marsh v. Chambers*, 463 U.S. 783, 795 (1983). "It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation with the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt." *Legal Tender Cases*, 79 U.S. at 531. This traditional and expected mode of constitutional analysis was not used in *Aguilar* and *Grand Rapids*.

The majority in *Aguilar* placed the burden on the State to prove that violations of the Establishment Clause would *never* happen. The State, in turn, could not prove that such violations would never happen unless they resorted to massive surveillance, a result this Court claimed would constitute excessive involvement between Church and State. *Aguilar*, 473 U.S. at 412-13. The majority blithely acknowledged that that result was a "Catch 22." *Id.* at 413. The Court was concerned that the presence of public employees in a pervasive religious environment would lead, over time, to a subversion of the public character of the program and lead, inevitably, to misuse of public funds. On this hypothetical basis, the program was declared unconstitutional.²⁶ Leading commentators have criticized this unusual approach:

Aguilar deployed abstract separationist logic and baseless evocations of sectarian strife to strike down a benign legislative program worked out by Congress after extensive cooperative effort with and testimony from a wide variety of religious organizations. Moreover, the decision seemed to place religion, alone among human activities, in a suspect category. Normally, a litigant challenging a governmental action would have the burden of showing that the activity in question violated the Constitution. But *Aguilar* inverted the usual presumption, by striking down the remedial program because the government could not prove there would never be unconstitutional advancement of religion by public school teachers.

Glendon and Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. at 514. This inversion of constitutional presumptions did far more than cause the majority to reach the wrong result; it did immediate and unjustified damage to the educational prospects of untold thousands of disabled children in New York and throughout the country.

²⁶ The remedial education program in *Grand Rapids* was also struck down by this Court by a 5 to 4 vote. *Grand Rapids*, 473 U.S. at 398-99 (O'Connor, J., concurring and dissenting). On *Grand Rapids'* community education program, the Court split 7-2. *Id.* at 400-01.

In her dissenting opinion, Justice O'Connor accurately noted the tremendous value that remedial education programs have to the most poor and disadvantaged children in our society. She rightly expressed concern for the educational needs of the children and the fact that the record had not shown any unconstitutionality. *Grand Rapids*, 473 U.S. at 398-99.²⁷ Absent some record evidence of harm, Justice O'Connor voted to sustain the programs, believing that the alleged constitutional infirmity was particularly weak. *Aguilar*, 473 U.S. at 426. Thus it is that in these two cases, *Aguilar* and *Grand Rapids*, overreaching legal theory, unaffected by any consideration of the social good to be achieved, has led to the crippling of significant and effective social programs.

One would have thought that nearly two decades' experience in a program involving hundreds and thousands of children, especially given the amount of attention to the program during nearly ten years of litigation, some situation would have come to light that might suggest an Establishment Clause violation, if any existed. Not a single instance, however, was documented. *Aguilar*, 473 U.S. at 424. As now Chief Justice Rehnquist admonished:

The Court today strikes down nondiscriminatory non-sectarian aid to educationally deprived children from low-income families. The Establishment Clause does not prohibit such sorely needed assistance; we have indeed traveled far afield from the concerns which prompted the adoption of the First Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need.

Aguilar, 473 U.S. at 421 (Rehnquist, J., dissenting).

The road back to a sound and proper interpretation of the Establishment Clause can be guided by this Court's recent opinion in *Zobrest*, which relied upon *Bowen v. Kendrick*, *supra*, *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), and *Mueller v. Allen*,

²⁷ See also *Structural Free Exercise*, *supra* note 11, at 511-12.

463 U.S. 388 (1983), while rejecting a rote application of *Grand Rapids*, *Meek v. Pittenger*, 421 U.S. 349 (1975), and impliedly *Aguilar*.²⁸ 113 S. Ct. at 2468-69. In *Zobrest*, as in the cases it relied upon, the Court examined the evidence and rejected the *Aguilar/Grand Rapids* proposition that findings of unconstitutionality can be based upon unsubstantiated hypotheticals.²⁹ By returning to this proper mode of constitutional analysis, the Court rightly exalted substance over form ~~instead of vice versa~~. *Zobrest*, 113 S. Ct. at 2469. Because *Aguilar* and *Grand Rapids* were not decided in this way, but substituted form and supposition for substance and facts, those opinions deserve to be explicitly rejected. *Cf. Aguilar*, 473 U.S. at 420 (Burger, C.J., dissenting) ("The Court today fails to demonstrate how the interaction occasioned by the program at issue presents any threat to the values underlying the Establishment Clause.").

Although implicit and explicit reliance on *Aguilar* and *Grand Rapids* in subsequent cases would suggest that some deference be accorded those opinions under *stare decisis*:

I would accord these decisions the appropriate deference commanded by the doctrine of *stare decisis* if I could discern logical support for their analysis. But experience has demonstrated that the analysis in Part V of the *Meek* opinion is flawed. At the time *Meek* was decided, thoughtful dissents pointed out the ab-

²⁸ "[T]he Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." *Zobrest*, 113 S. Ct. at 2469. It should be noted, of course, that the Kiryas Joel School District does not place employees in the religious schools; it was the presence of the Monroe-Woodbury employees in a building adjacent to the religious schools that the New York courts said *Aguilar* and *Grand Rapids* prohibited.

²⁹ Similarly in *Bowen v. Kendrick*, rather than presume the unconstitutional administration of the AFLA, the Court remanded for creation of a factual record. Justice Kennedy, joined by Justice Scalia, rejected a constitutional qualification based on the non-sectarian character of a grantee. To them what the grantee did with the program funds was dispositive. 487 U.S. at 624 (Kennedy, J., concurring).

sence of any record support for the notion that public school teachers would attempt to inculcate religion simply because they temporarily occupied a parochial school classroom, or that such instruction would produce political divisiveness. Experience has given greater force to the arguments of the dissenting opinions in *Meek*. . . . Given that not a single incident of religious indoctrination has been identified as occurring in the thousands of classes offered in Grand Rapids and New York City over the past two decades, it is time to acknowledge that the risk identified in *Meek* was greatly exaggerated.

Aguilar, 473 U.S. at 427-28 (O'Connor, J., dissenting) (citations omitted). Similarly, it is time to acknowledge that *Aguilar* and *Grand Rapids* were based upon an improper mode of constitutional analysis and thus reached incorrect results. So long as *Aguilar* and *Grand Rapids* continue to be followed, interpreted and misinterpreted by lower courts, situations such as the one presented by this case will be created and recreated. State legislatures will be forced to seek solutions to seemingly intractable problems fabricated by the artificial strictures those cases have placed on government efforts to provide social and educational services to those most in need.

CONCLUSION

The judgment of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL
VILLAGE SCHOOL DISTRICT, et al.,

Petitioners,

v.

LOUIS GRUMET AND ALBERT HAWK,

Respondents.

On Writ Of Certiorari To The
New York Court Of Appeals

BRIEF OF THE
SOUTHERN BAPTIST CONVENTION
CHRISTIAN LIFE COMMISSION
AS AMICUS CURIAE SUPPORTING PETITIONERS

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**BRIEF OF THE
SOUTHERN BAPTIST CONVENTION
CHRISTIAN LIFE COMMISSION
AS AMICUS CURIAE SUPPORTING PETITIONERS**

This brief is being filed with the written consent of counsel for both the petitioners and the respondents, which consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Southern Baptist Convention is the nation's largest Protestant denomination, with over 15.4 million members in over 38,400 local churches. The Christian Life

Commission is the public policy agency of the Convention and is assigned to address religious liberty and other public policy issues. Amicus produces publications and seminars to educate Southern Baptists about ethical and moral issues in daily Christian life, and to advocate responsible Christian citizenship as part of biblical decision-making. Amicus also seeks to bring biblical principles and Southern Baptist convictions to bear upon public policy debates before courts, legislatures and policy-making bodies. Amicus frequently files briefs as *amicus curiae* in important religious liberty litigation, such as this case.

Southern Baptists are deeply interested in and affected by both free exercise and establishment issues, and desire to see the Court develop a workable test which will safeguard the interests behind both clauses.

STATEMENT OF THE CASE

Amicus adopts the statement of facts in the petitioner's brief. The following facts are summarized as most important to our arguments.

In 1989, the New York State legislature passed Chapter 748, entitled "AN ACT to establish a separate school district in and for the village of Kiryas Joel, Orange county".¹ On July 24, 1989, Governor Mario Cuomo

¹ Chapter 748 of the Laws of 1989 provides:

§ 1. The territory of the village of Kiryas Joel in the town of Monroe, Orange county, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district

signed the law, stating his conclusion that it is facially constitutional, while also urging the school district to "take pains to avoid conduct that violates the separation of church and state because then a constitutional problem would arise in the application of the law. The village officials acknowledge this responsibility." 1 R. 111.

The law is not challenged as applied, or for any conduct by the school which violates church-state separation. Rather, it is challenged as facially unconstitutional as an establishment of religion. Still, it is relevant to note some facts about the nature and function of the school that was created.

Since July 1, 1990, the Kiryas Joel Village School District has operated a totally secular special education school for approximately 200 disabled children who are part-time or full-time students. The disabilities of the students include "mental retardation, deafness, speech and language impairments, emotional disorders, learning disabilities, Down's Syndrome, spina bifida and cerebral palsy." *Board of Education v. Wieder*, 72 N.Y. 2d 174, 179, 531 N.Y.S.2d 889, 891 (1988). The public school building is secular in design and furnishing. The curriculum is secular, covering reading, writing, arithmetic, music and

and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law. § 2. Such district shall be under the control of a board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.

§ 3. This act shall take effect on the first day of July next succeeding the date on which it shall have become a law.

physical education, all without religious content. The faculty is secular, including a superintendent who served for 20 years in the New York City public school system, and who is not Hasidic. The teachers and therapists are ethnically and religiously diverse, none living in the village. Nothing about the manner of operation of the school has violated Governor Cuomo's warning about church-state separation.

Respondents, who are officers of the New York State School Boards Association, filed suit, claiming that Chapter 748 is unconstitutional on its face because it allegedly "establishes religion" in violation of the First Amendment of the United States Constitution, and the New York State Constitution. The New York trial judge held that the statute violated all three prongs of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as well as the New York Constitution. The Appellate Division, Third Department, affirmed, 2-1, holding that the second prong of *Lemon* was violated because the primary effect of the law was to advance religion. The court said that "religion played a role in the dispute," over many years of controversy and litigation. Therefore, the solution of creating a school district coterminous with the village had created "a symbolic union between church and state" that "is significantly likely to be perceived by adherents of the Satmarer Hasidim as an endorsement, and by nonadherents as a disapproval of their individual religious beliefs." The New York Court of Appeals affirmed the holding as to the second prong of the *Lemon* test.

The residents of the village are members of a religious order known as Satmar Hasidic Jews, devoutly religious people who believe in maintaining an insular

community where religious ritual is scrupulously followed. Yiddish is frequently spoken, and distinctive religious attire is the norm. Television is excluded. Generally, children receive their education in private schools, separated as to gender, rather than in public schools.

The village is a municipal corporation. The citizens of the village have voluntarily chosen to live in the geographic proximity to each other so as to facilitate the exercise of their shared religious beliefs and preserve their unique culture and way of life. (Pet. App., p.3)

The village was formerly part of the surrounding Monroe-Woodbury school district. At one stage Hasidim parents tried sending their disabled children to the Monroe-Woodbury special education school, but their children suffered emotional trauma from being teased and ridiculed for their differences of dress and customs by the other students. Parents then withdrew their handicapped children until the new school district was created, permitting a special education school within the Village community, where Hasidim would be the norm.

Other plans had been tried. Under one plan, public school teachers came onto private school premises to teach the disabled children. *Aguilar v. Felton*, 473 U.S. 402 (1985), prohibited a similar arrangement, so this plan was stopped. Another plan set aside several public school classrooms for Satmar children only, but this plan was also judicially invalidated under the *Lemon* test. Finally the state legislature, the governor, the schools, and the parents discovered the idea of Chapter 748, creating a new school district within the village, which satisfied everyone - except for the school boards association

leaders. They complained that the plan appeared to be public funding of a private religious school. Further, since only Hasidic Jews lived in the Village, the new school district would be controlled by an exclusively Hasidic school board.

No one is excluded from residing in the village because of religion or race, and no resident children are excluded from attending the public school based on religion or race. The testimony of superintendent Benardo is that the KJV district has provided bilingual and bicultural services to non-Hasidic students whose primary language is Yiddish and whose school district of residence could not offer such services. It has also begun an assessment of providing services to a few Spanish-speaking children who reside in Kiryas Joel. Benardo Aff. 8-9. Nonetheless, respondents contend that the purpose of the statute was to accommodate the separationist religious doctrine of the Hasidim, and that such accommodation has the unlawful effect of endorsing religion by creating a symbolic union between the state and the religious community.

SUMMARY OF ARGUMENT

Chapter 748 does not violate the Establishment Clause, because it accommodates the independently-derived religious practices of the community and its student population. It does not interfere with the religious liberty of non-adherents by forcing them to participate in religious practice or to subsidize religious teaching. It does not favor one form of religious belief over another. It

does not use the government's taxing or spending power to induce, coerce or distort individual religious choice, or to interfere with the religious autonomy of a religious institution.

ARGUMENT

I. THE PRINCIPLE OF ACCOMMODATION SHARPENS THE FOCUS UPON RELIGIOUS LIBERTY AS THE GOAL OF THE RELIGION CLAUSES, MAINTAINING BENEVOLENT NEUTRALITY BETWEEN GOVERNMENT AND RELIGION.

There is widespread agreement that the Establishment Clause and the Free Exercise Clause have as their common ultimate goal the protection of religious liberty.² Professor Michael McConnell, University of Chicago Law School, in his article, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986) makes clear that the primary good of the religion clauses is freedom of religious choice, and the primary evil is government interference with religious choice in a manner which induces, coerces or distorts the free choices of religiously-based conscience. Religious liberty includes both individual choice of religious belief and practice, and autonomy of religious organizations from government interference.

In *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-145 (1987), this Court said: "the government may

² M. McConnell, *Accommodation of Religion*, SUP. COURT REV. 1985, p.1-59.

(and sometimes must) accommodate religious practices . . . without violating the Establishment Clause."

The principle of accommodation is rooted in the logic of the text of the First Amendment. Obviously, the prohibition on establishment must be interpreted in some manner that is logically consistent with government's obligation not to prohibit the free exercise of religion. The concept of accommodation with benevolent neutrality serves this end.

The first modern case to define the concept was *Zorach v. Clauson*, 343 U.S. 306, 313-14, (1952), involving a public school program of "released time" in which students were permitted to leave school premises during the day to attend religious instruction off campus. The Court said:

"When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."

In *McDaniel v. Paty*, 435 U.S. 618 (1978), the Court struck down a state law which sought to bar clergymen from elective public office. Justice Brennan explained: "government [may] take religion into account . . . to exempt, when possible, from generally applicable government regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish." 435 U.S. at 639.

Permissible accommodations allow government to take religion into account to remove obstacles to a religious practice or belief that was adopted independently of any government action, and that pre-existed government involvement. Impermissible accommodations create an incentive, inducement or coercion to adopt religious practices or beliefs favored by the government. The principle of accommodation has been frequently discussed by most justices in many of the religion cases over the past three decades.³

³ See *Corporation of Presiding Bishops v. Amos*, 483 U.S. 327 (1987) (upholding Title VII's exemption for religious organizations from employment discrimination law.) *Gillette v. United States*, 401 U.S. 437 (1971) (upholding religious conscientious objection from military service.) *Walz v. Tax Commission*, 397 U.S. 664 (1970) (upholding exemption of religious organizations from real estate taxes.) *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (upholding statutory requirement that employer provide reasonable accommodation for employees' religious practice under Title VII of the Civil Rights Act.) *Wisconsin v. Yoder*, 406 U.S. 205 (1972). (exemption of Amish parents and their secondary-aged students from mandatory school attendance laws, was required by free exercise, and did not violate establishment clause.) *Widmar v. Vincent*, 454 U.S. 263 (1981) (state university must allow college student group equal access to open forum, and this does not violate establishment clause.) *Mergens v. Westside Community Schools*, 110 S.Ct. 2356 (1990) (federal Equal Access Act, extending *Widmar* equal access principle to secondary school Bible clubs, etc., does not violate establishment clause.) *Marsh v. Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) (distinguishing between official legislative prayers and prayers that would "accommodat[e] individual religious interests.") *Thomas v. Review Board*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting) ("governmental assistance which does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), Chief Justice Warren Burger, the author of *Lemon*, held that real estate tax exemptions for religious organizations did not violate the Establishment Clause. He described the relation of free exercise and establishment clause concerns this way:

"The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship or interference." [emphasis added] (at 397 U.S. at 669)

It is this principle which your amicus urges this Court to restore to its proper and fundamental place in Religion Clause jurisprudence.

independent religious choice does not permissibly involve the government in religious choices, and therefore does not violate the Establishment Clause.") *Sherbert v. Verner*, 374 U.S. 399 (1963) (free exercise requires religious exemption in unemployment compensation law, and this does not violate establishment clause.) *Lee v. Weisman*, 112 S.Ct. 2649 (1992) (Souter, J., concurring that commencement prayer violated the establishment clause as state-sponsored religious worship: "accommodation must lift a discernible burden on the free exercise of religion.")

II. THE *LEMON* TEST BLURS THE FOCUS ON RELIGIOUS LIBERTY, FIXATING INSTEAD ON SECULARISM, PRODUCING HOSTILE RESULTS FOR RELIGIOUS ACCOMMODATION.

A. The *Lemon* Test fixates on secularism, not religious liberty.

The very formulation of the *Lemon* test seems to obscure the value of religious liberty. According to *Lemon*, first, every legislative purpose must be secular. Second, the primary effect must be secular, neither advancing nor inhibiting religion. Third, government must avoid excessive entanglement with religion.

By asking, as the threshold question, whether a religious accommodation has a secular purpose and secular effects, the *Lemon* test has virtually predetermined the outcome against religion. Thus, the test promotes, secularism, not religious liberty. If secular is understood to mean non-religious, then religious accommodations by government will be presumed to be illegal. There is nothing in this test that would encourage public officials to presume that accommodations of religion may foster religious liberty, and therefore may be lawful.

B. The *Lemon* Test fosters hostility, not neutrality.

Insisting on a secularizing purpose, and permitting only secular effects makes the test inherently hostile to religious liberty. The *Lemon* test does not adequately address permissible accommodations, or provide clear guidance to officials and courts who must draw lines between permissible accommodations of religion and

impermissible benefits to religion. When *Lemon* is applied, courts often strike down benevolently neutral actions by public bodies trying to show tolerance of all elements of America's pluralistic society.

The courts below, applying *Lemon*, hold that the public institution whose goal is to teach good citizenship and tolerance cannot itself tolerate religious diversity among patrons and students, for fear that this might have the "primary effect" of advancing or endorsing a religion that is contrary to the secular dogma of conformity.

Many parents and teachers have retreated from public schools, in part because they refuse to accept the "absolutely secular" model. They perceive, as Justice Goldberg warned, a "brooding and pervasive devotion to the secular, and a passive, and even active, hostility to the religious."⁴

C. The *Lemon* Test fuels religious prejudice, not respect for religious pluralism.

The instant case is a good example of how *Lemon* takes the focus off of religious liberty and puts it on secular objectives, producing hostile results. *Lemon* looks at a secular law creating a secular school, and suspects that the lawmakers' purpose was not sufficiently secular, since religious persons benefited. Such myopia sees Governor Cuomo and the New York legislature intending to

⁴ *Abington School District v. Schempp*, 374 U.S. 203, 306 (1963).

establish Hasidic Judaism as a government-favored religion. *Lemon* either overlooks or declares illegitimate the intention to provide the special educational services to disabled children, while accommodating the pre-existing Hasidic convictions as much as reasonably possible.

Lemon next focuses on secular effects, regardless of the intentions of lawmakers. Here, *Lemon* demands that the "primary effect" of the law "neither advances or inhibits religion." The lower courts said the special education services were already being provided at a public school outside the Village, so Chapter 748 did not have the primary effect of providing special education services, but rather the effect of catering to the separatist religious doctrine of the Hasidim, allowing them to dictate that a school must be located within their village.

The Hasidim did not dictate anything. Lawmakers made a deliberate and thoughtful compromise decision about the best possible way to accommodate the state's interest in education and the Hasidim's interest in protection of their disabled children. *Lemon* strains to see who got the better end of the bargain, the state or religious parents, and if religious people were satisfied with the plan, it must be illegal.

Respondents' greatest fear seems to be that Chapter 748 will advance the petitioners' "insular" or "separatist" religious tenets.⁵ They say "accommodation [of Satmar

⁵ Most Southern Baptists do not share the particular religious beliefs or practices of the petitioners at issue in this case. Many Baptists and other Christians embrace the biblical principle that a follower of Jesus Christ should be "separated" from

separatist beliefs] would contravene the basic purpose of our system of public education to prepare students for citizenship in a heterogeneous democratic society because the state would be directly involved in promoting separatism rather than pluralism." R. Br. p. 22. Respondents express their conviction about the importance of secular, heterogeneous pluralism with almost religious fervor, as if it were the official religion of public education. Since petitioners don't want their children to be conformed into the homogeneous mold of the surrounding community, respondents seem to treat petitioners like heretics, or worse – "segregationists." Respondents strain credulity to connect this religious community to racial "segregationists" practicing "gerrymandering." Their hostility toward the religion of petitioners is transparent, and appalling, but is fostered by the *Lemon* test's "search and destroy" mindset against religious accommodations in public life.

Wisconsin v. Yoder, 403 U.S. 205 (1973) has many parallels with this case. The religious beliefs of Amish parents regarding separatism in education and culture were accommodated by exempting the parents' children from

the world, and should resist the world's pressures to conform to the surrounding culture. Christians are exhorted to be "in the world" without being "of the world." In Second Corinthians 6:14-17, the Apostle Paul repeats the Old Testament command, " 'Therefore, come out from them and be separate,' says the Lord." See also John 17:14-17 and Romans 12:2. Baptists would interpret and practice the principle of separation much differently than the Hasidim, but readily defend the religious liberty of the Hasidim to practice their religion without government interference.

the mandatory public school attendance laws. Here the state of New York has voluntarily made such an accommodation. In neither case is there improper "endorsement."

Also relevant is the case from last term, *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993), in which a state-paid interpreter could be furnished to a deaf student at a private religious school, without establishing religion, because the aid was a specific application of an overall policy "that neutrally provide[s] benefits to a broad class of citizens defined without reference to religion." (at page 2466). Similarly, Chapter 748 is a specific application or adaptation of the school districting laws to provide benefits to disabled children, a class defined without reference to religion.

D. The *Lemon* Test feeds confusion, not clear direction

Consistency has not been a hallmark of the *Lemon* test. It has been used to prohibit the display of a poster listing the Ten Commandments in Kentucky classrooms, *Stone v. Graham*, 449 U.S. 39 (1980). Yet, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), Chief Justice Rehnquist observed that "The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent - not seasonal - symbol of religion: Moses with the Ten Commandments." 465 U.S. at 677. In *Lynch*, the Court side-stepped *Lemon* and upheld a nativity scene display by the city of Pawtucket, Rhode Island. But in *County of Allegheny v. A.C.L.U.*, 109 S.Ct. 3086 (1989), the Court upheld a government display including a menorah,

while prohibiting a government display of a creche, citing *Lemon* as the basis for both holdings.

A majority of the members of this Court have criticized the *Lemon* test for both theoretical and practical problems. See *Lamb's Chapel v. Center Moriches School District*, 113 S.Ct. 2141 (1993) (Scalia, J., concurring in the judgment) (collecting cases at 2149-50)). The inconsistent holdings confuse public officials about what the law is and how to apply it. Mixed signals cause collisions at the intersection of Church and State. Clearer signals might reduce collisions and tensions at this important intersection.

III. A REVISED TEST SHOULD ENCOURAGE GOVERNMENT OFFICIALS TO SHOW ACCOMMODATING NEUTRALITY TOWARD PRIVATE RELIGIOUS CHOICES, INDEPENDENTLY DERIVED, WHICH ARE NEITHER INDUCED, COERCED OR SUBSIDIZED BY THE STATE.

Your amicus joins the petitioners and other amici who urge the Court to use this case as the vehicle to reformulate an Establishment Clause test which will guide public officials in upholding government accommodations of religion, while "determin[ing] when accommodation slides over into promotion, and neutrality into favoritism." *Texas Monthly v. Bullock*, 489 U.S. 1, 40 (1989) (Scalia, J., dissenting). As Justice O'Connor stated in her concurring opinion in the moment of silence case, *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. at 2504, (1983), "the challenge posed by [the accommodation argument] is how to

define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion."

A new Establishment Clause test should have as its goal the promotion of religious liberty, including the protection of both individual choice and institutional autonomy from government coercion and interference. A test based on these principles, would include the following:⁵

I. Does the state action allow or accommodate independent religious choice? Religious choice is independent if:

A. The religious practice or belief pre-existed the state action, or

B. The religious practice is adopted through private, family, church or community influences, and

C. The state action does not provide preferential treatment for a particular religious practice or belief, which has the demonstrable effect of inducing, coercing or distorting religious choice.

II. Does the state action interfere with the religious liberty of non-adherents by inducing or coercing them to alter their religious practice?

III. Does the state action go beyond accommodation and show favoritism toward one religious choice which would not be shown to other religious or non-religious choices?

⁵ See article by M. McConnell, *Accommodation*, pages 35-39.

IV. Does the state action use the taxing and spending power of government to provide some financial incentive, benefit or penalty to a particular religious activity which is not given to other religious or non-religious alternatives?

A. Is the demonstrable effect to induce, coerce or distort:

- 1.) religious choice by individuals or
- 2.) the religious autonomy of a religious institution?

B. Is the demonstrable effect to directly subsidize religious worship, teaching, and indoctrination?

A. The Creation of a Village District is a neutral accommodation of independent religious choice.

The creation of the KJV district is a neutral accommodation of the independent choices of the Satmar Hasidim. Their beliefs and cultural practices derive from ancient tradition, and surely pre-exist the state action in dispute in this case.

The state is not involved in the religious aspects of the Hasidim community other than to acknowledge their concerns about the educational environment for their special needs children, which reasons happen, in this instance, to be religiously based. If the reasons were purely psychological or cultural, the state would have acted the same. Chapter 748 accommodates religious needs in the same way the state would have responded to similar psychological needs of children of other religions or no religion.

B. Chapter 748 does not induce, coerce or distort religious choices of adherence or non-adherence.

The Court of Appeals held that Chapter 748 is unlawful because, on its face, the law violates the second prong of *Lemon*, i.e., it has the primary effect of advancing religion. The court analyzes whether the effect of the law is to "endorse" religion, using a term favored by Justice O'Connor. The court also refers to the symbolic impact or the message of endorsement implied by "a close identification of the responsibilities of government and religion (See *Grand Rapids School District v. Ball*, 473 U.S. 373, 389" . . . (1985)). (601 N.Y.S.2d 61 at 66).

The issue has already been decided by this Court in *Wolman v. Walter*, 433 U.S. 229 (1977). The Court considered various types of "state aid to pupils in church-related elementary and secondary schools" (at page 232) and found that "providing therapeutic and remedial services at a neutral site off the premises of the non-public school will not have the impermissible effect of advancing religion" (at 248). "The premises" means that religious premises caused the apparent endorsement of religion. If the premises are state-owned and controlled, there is no violation simply because the pupils or their parents retain religious convictions.

The proposed accommodation test takes a different approach to the same concerns raised in the various tests for "endorsement" or "coercion" or "symbolic union." Under this approach, the state action is examined with an eye to inducements, coercion or pressure to change or distort one's religious practices to suit the state. By this

test, the state action is benevolently neutral. No one should feel like a "second class citizen" who is not Satmar, and no one should feel that the Satmar religion is favored because of the secular nature of the special education school which is created. Everyone should feel grateful that the state will work hard to accommodate even minority religions, in the field of special education especially.

C. Mistaken beliefs about endorsement should be corrected by disclaimers, rather than capitulating to them by repeal of the law.

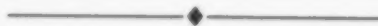
If someone mistakenly believes that the State is endorsing the religion of Hasidic Judaism by this law, the correct solution to that problem is an explanation, not the voiding of the law. In numerous prior cases where there was concern about apparent endorsement of religion by government, the court has held that the solution was not to penalize the religious person, but to have a government official make an announcement disclaiming endorsement to those who may misunderstand. For example, airport official soften post signs or play recorded announcements in a terminal area, disclaiming state endorsement of religious or political leafleteers. In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court cited the use of a disclaimer in the university student handbook to dispel the appearance of state endorsement of the student groups which used the student union.⁶ *Widmar*, supra.

⁶ *Widmar v. Vincent*, 454 U.S. 236, 276, n.15 (1981).

D. Lemon's obsession to purge religious intentions and effects invites excessive entanglement.

The respondents object to the state accommodating the educational concerns of parents if those concerns are religiously based, even if the parents and the state may articulate the trauma being experienced by Hasidic children in purely secular, psychological, or educational terms. *Lemon's* neutrality-turned-hostility threatens to push courts and officials into excessive entanglement, the very concern of the third prong of *Lemon*. If the state, through its political branches, finds legitimate educational reasons to pass a particular education law, courts should not scrutinize the words and motives of religious parents in this manner to see if law is "secular" enough to be legal.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), Justice White based his dissent in part on a distinction between religious speech, which he said was protected in school buildings, and religious worship, which he said was not protected. (White, J., dissenting at pages 283-86) The majority disagreed, noting that this distinction would entangle officials and courts in the scrutiny of words, motives and religious significance by religious groups, to discern what words were mere speech, and what words were religious worship. *Widmar, supra*, at 269-70, note 6; 272 note 11.



CONCLUSION

The Establishment Clause may reasonably be interpreted to require the "separation" of the institutions "of Church and State," but it does not require the separation of religious persons or principles from the State. The metaphorical "wall of separation between church and state" was never intended to become a wall of separation between handicapped children and the public help they so desperately need.

Religious persons have a fundamental right to participate in government, to bring their religiously-informed principles to bear upon policy-making, and to share in public services to which they contribute tax dollars. If the Establishment Clause prohibited government from expressing benevolent regard for religion, then the Free Exercise Clause would have been the first violation of the Establishment Clause. The Free Exercise Clause is clearly official action affirming the inherent value and good of religious liberty, so that its free exercise is to be among the First Freedoms to be protected in our Bill of Rights.

Relentless secularism also violates the Establishment Clause. The State is to be religiously pluralistic – not secular, in order to accommodate religious liberty, that private religious choices may flourish. This Court can advance this value by refocusing upon freedom of religious choice as the touchstone of the Religion Clauses, by upholding accommodations of religion which demonstrate benevolent neutrality, so long as taxing and spending powers are not used to coerce, induce or distort individual choice or interfere with autonomy of religious organizations.

This Court is now presented with a compelling opportunity, root out the malevolent secularism which has infected the *Lemon* progeny, and to replace it with benevolent neutrality, and thereby to restore an Establishment Clause doctrine which will promote religious liberty rather than obliterate it.

The judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1993

BOARD OF EDUCATION OF THE
KIRYAS JOEL VILLAGE SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

LOUIS GRUMET, *et al.*,

Respondents.

On Writ of Certiorari to the
New York Court of Appeals

BRIEF OF INSTITUTE FOR RELIGION AND POLITY
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS

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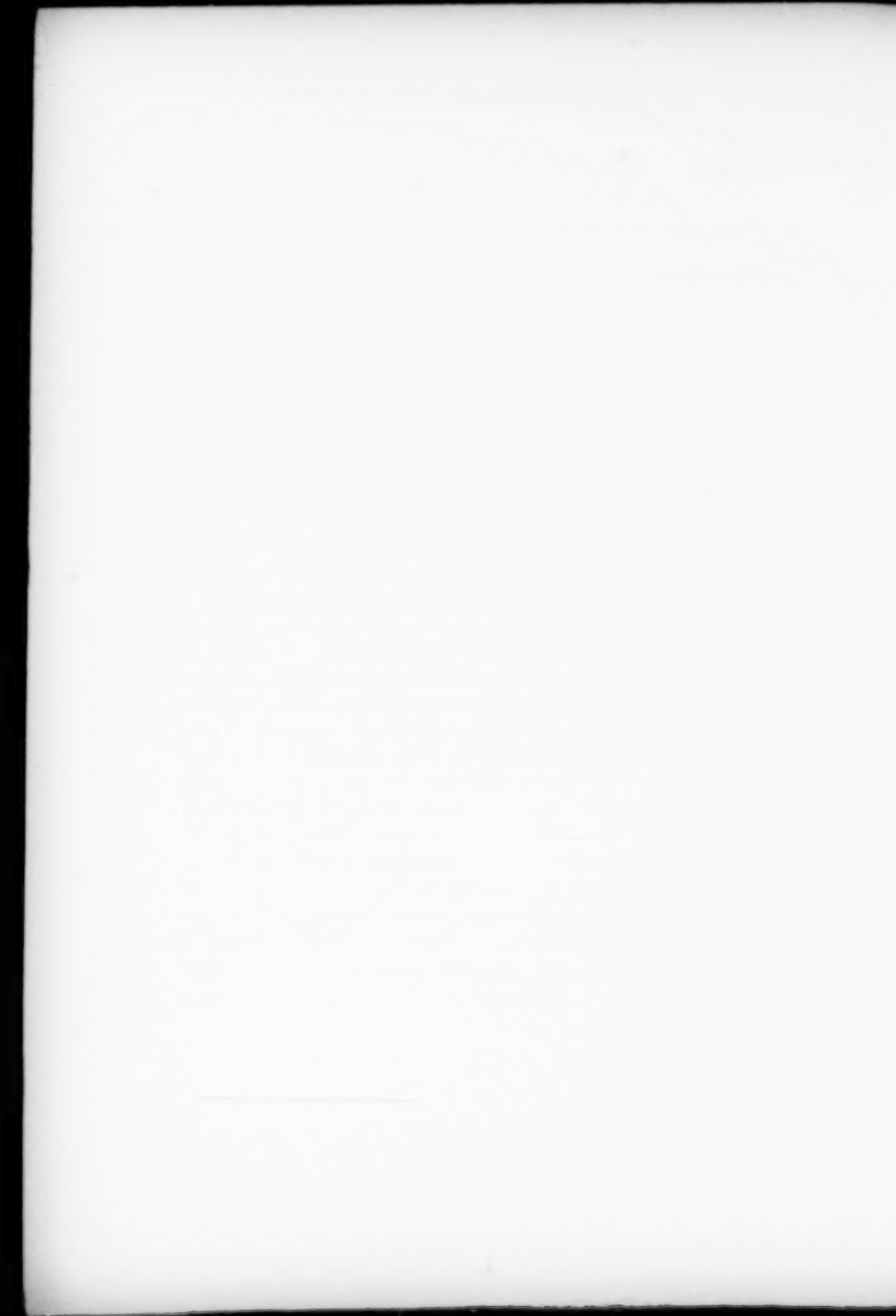
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BRIEF OF INSTITUTE FOR RELIGION AND POLITY
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.3 of this Court, the Institute For Religion And Polity respectfully submits this brief *amicus curiae* in support of Petitioners. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of the Court.

The Institute For Religion And Polity is a non-profit, non-partisan organization dedicated to the study of religious

values and the dynamics of church-state relations in contemporary society. Although the Institute's concerns are primarily academic, we believe this case raises a significant question whose disposition will have broad ramifications for Establishment Clause jurisprudence for many years to come, and that our perspective may complement the briefs of the parties and assist the Court in the resolution of this important issue.

SUMMARY OF ARGUMENT

Establishment Clause jurisprudence of the last several decades has been dictated by the principle that government must "pursue a course of complete neutrality toward religion," *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). This principle is inherently deficient, however, because a baseline definition of neutrality -- vital for ensuring the principle's consistent application -- cannot be established. Rather, the definition of neutrality appears to fluctuate from case to case, depending upon whether a court envisages, in the first instance, that the government action under challenge should be upheld or struck down. Like the fallacy of a "weighted hypothesis" in science, the neutrality principle leads in whichever direction a court wishes to go: It does not provide a principled way of knowing which direction is the correct one. Consequently, application of the neutrality test has led to a series of irreconcilable decisions -- and to grave concerns, even by members of the Court, that secularism has supplanted government accommodation of religion as the theoretical underpinning of the Establishment Clause. Because the courts' assessment of whether government action "endorses" or "inhibits" religion cannot be undertaken in a principled way, the neutrality test is not a legitimate mode of constitutional analysis.

A far more workable approach is for Establishment Clause analysis to focus on the extent to which some form of government coercion or compulsion can be discerned in the government action under scrutiny. Concern for this aspect of governmental power was the principal consideration of the Framers as the Religion Clauses were debated in the First Con-

gress. Reliance upon this test for ascertaining the lawfulness of legislative action will permit the courts greater latitude to accommodate religious communities and practices, thus promoting the ideal that religious influences are a positive force in the life of our Nation. Viewed in this framework, Chapter 748 is not facially invalid under the Establishment Clause. It is a reasonable accommodation of the acute needs of a religious community which involves no element of direct or indirect compulsion upon others.¹

ARGUMENT

I. THE PRINCIPLE OF COMPLETE GOVERNMENT NEUTRALITY TOWARD RELIGION IS NOT ANALYTICALLY WORKABLE.

1. Throughout much of our Nation's history, the influence of religion in civic life was viewed as important to the well being of the body politic. Religion was seen as nurturing public virtue, and religious communities as promoting positive relations between the individual and the government. At least as far back as John Locke, civil society and religion were considered complementary, not mutually exclusive, realms, and religion was valued as a legitimate and important influence in public life. See Locke, J., *Letter Concerning Toleration*, in LOCKE: SELECTIONS 43-51 (S. Lamprecht, ed. 1956); see also A. REICHLEY, RELIGION IN PUBLIC LIFE 85-113 (1985).

¹ The lower court reasoned that Chapter 748 has the primary effect of advancing religion because "the statute not only authorizes a religious community to dictate where secular educational services shall be provided to the children of the community, but also 'creates the type of symbolic impact that is impermissible under the second prong of the Lemon test.'" *Grumet v. Bd. of Education of the Kiryas Joel Village School District*, 618 N.E. 2d 94, 98 (N.Y. 1993). The majority relied on its conclusion that "only Hasidic children will attend the public schools in the newly established school district, and only members of the Hasidic sect will likely serve on the school board. *Ibid.*

Those who adopted the Constitution "believed that the public virtues inculcated by religion are a public good." *Lamb's Chapel v. Center Moriches Union Free School District*, 133 S. Ct. 2141, 2165 (1993)(Scalia, J., concurring in the judgment). Indeed, during the momentous summer of 1789, when Congress was in the process of drafting the First Amendment, it re-adopted the Northwest Territory Ordinance of 1787, Article III of which provides: "*Religion*, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 Stat. 52 (emphasis added).

In his farewell address to Congress, George Washington warned of the "supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on the minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." 3 ANNALS OF AMERICA 612 (1968). Even Alexis de Tocqueville, touring the United States early in the nineteenth century, reported that Americans viewed religion as "indispensable to the maintenance of republican institutions." A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 58 (R. Hefner, ed. 1956).

Modern expressions of this proposition may also be found. Justice Douglas, writing for the majority in *Zorach v. Clausen*, 343 U.S. 308 (1951), observed that "we are a religious people whose institutions presuppose a Supreme Being." *Id.* at 313. "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." *Id.* at 313-314. And in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court stated that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions ... Anything less would require the 'callous indifference' we have said was never intended." *Id.* at 673 (citations omitted).

Accordingly, the Establishment Clause should not be applied in a way that is inconsistent with "the virtually unani-

mous view among the Founders that functional separation of church and state should be maintained without threatening the support and guidance received by republican government from religion." A.REICHLEY, *supra*, 112. While religion was not to be established, its *accommodation* was crucial to the moral foundations of ~~our~~ government. "Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings." *Abington School District v. Schempp*, 374 U.S. 203, 306 (1963)(Goldberg, J., concurring).

2. Notwithstanding widespread acknowledgement of the value of religion in the life of the Nation, this ideal has been undermined by a principle which has held sway in Establishment Clause jurisprudence since mid-century. This principle -- that government must "pursue a course of complete neutrality toward religion," *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) -- emerged from the Court's first Establishment Clause decision in the modern era, *Everson v. Board of Education*, 330 U.S. 1 (1947). In *Everson*, the Court considered whether a city could pay for the bus transportation of school-aged children to parochial as well as to public schools. The Court summarized the principal force behind the drafting of the Establishment Clause as the desire of the Framers to eliminate the civil disorder and persecution that historically had accompanied the establishment of a single sect. Although the challenged funding was held permissible, the Court stated in unequivocal terms that the Establishment Clause required an absolute neutrality on the part of government, both as between particular religions and as between religion and nonreligion. The decision closed with the now famous phrase from Jefferson's letter to the Danbury Baptists that the Establishment Clause "was intended to erect a 'wall of separation' between the church and the state." 330 U.S. at 15-16 (quoting *Reynolds v. United States*, 98 U.S. 145 (1879)). "That wall must be kept high and impregnable," wrote the Court. "We could not approve of the slightest breach." *Id.* at 18.

For more than twenty years after *Everson*, the Court applied the neutrality principle by asking whether a challenged governmental action was secular in its purpose and primary effect. See *Abington School District v. Schempp*, 374 U.S. 222 (1962). The Court later added a third consideration, whether the state action fostered "an excessive ... entanglement with religion." *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). In *Lemon v. Kurtzman*, *supra*, the Court synthesized its prior decisions into the famous three-pronged test used to invalidate the legislation at issue in this case. *Lemon* was expressly predicated upon the concept of neutrality first articulated in *Everson*.

The objective of government neutrality toward religion has been articulated repeatedly in the years since *Everson*. "In the relationship between man and religion," said the Court in *Abington School District*, 374 U.S. at 226, "the state is firmly committed to a position of neutrality." See also *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("Government in our democracy, state and nation, must be neutral in matters of religious theory, doctrine, and practice.... The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *Lynch v. Donnelly*, 465 U.S. at 692 (O'Connor, J., concurring) ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.").

3. The concept of neutrality is beguiling because it seems intuitively valid, connoting the spirit of objectivity we should expect of courts in applying the Establishment Clause. But Establishment Clause analyses predicated upon this lodestar have been continually problematic, leading to inconsistent decisions in varied contexts. For example, in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), the Court held that display of a creche in Pittsburgh violated the Establishment Clause while display of a menorah in the same city did not. The display of the Pittsburgh creche was invalidated even though, four years earlier, the Court upheld the display of a Rhode Island creche situated with Santa Claus and reindeer.

Lynch v. Donnelly, supra. Such inconsistencies are attributable, in our view, to an inherent deficiency in the neutrality principle which makes it impossible to apply coherently.

The logical deficiency of the neutrality principle can be illustrated by considering the "effects" prong of the *Lemon* test, used to invalidate the legislation in this case. Analyses under this criterion of *Lemon* have yielded a chiefly subjective focus: "[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely *to be perceived* by adherents of the controlling denomination as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices." *School District of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985) (emphasis added).

Following this approach, the majority of the court below found Chapter 748 unconstitutional because it determined that the creation of the Kiryas Joel School District is "sufficiently likely to be perceived by the Satmar Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval, of their individual religious choices." *Grumet*, 618 N.E. 2d at 100. In the lower court's view, the mere enactment of the law created the kind of "symbolic union of church and state" that is unconstitutional. *Ibid*.

At least two critical shortcomings inhere, however, in an analysis which proceeds in this fashion. First, the argument from perceptions -- here, reliance upon the perceptions of the Satmar Hasidim vs. the perceptions of "nonadherents" -- in effect eliminates the possibility of a neutral position. For, whenever government and religion are publicly associated, support for religion might be inferred by some; and whenever the two are purposefully separated, hostility to religion might be inferred by others. The point is especially dramatic in this case. By definition, the Satmar Hasidim and "nonadherents" hold incompatible worldviews and, in this context, are likely to perceive the creation of the school district differently. Thus, consideration of the likely subjective reactions of partisan groups

cannot shed genuine light on the matter. *A fortiori*, when the perceptions of partisan groups are at issue, members of one group may tend to perceive "endorsement" while members of the other group may perceive an "inhibition" of the religious activity in question.

Indeed, as Judge Bellacosa pointed out in his dissent to the lower court's holding: "Reasonable minds may differ" as to whether Chapter 748 constitutes a "forbidden endorsement of religion." "'Objective observers' could not, in my view, so definitively conclude or perceive this situation as an establishment of religion, without inspiring some inquiry as to whether their views perhaps suffered from a predisposed hostility to religion in the constitutional debate sense." *Grumet*, 618 N.E. 2d at 115. In other words, "no message of endorsement for Satmar theology or its particular separatists tenets need necessarily or can fairly be inferred, either by objective third parties or by the protagonists themselves." *Ibid*.

Moreover, citizens' perceptions are not verifiable. Under the subjective effects analysis, the issue of governmental endorsement becomes a consideration of how the actions of the government will or might be misunderstood. In order to apply the notion of symbolic union objectively, the courts would be required to determine when citizens' responses are a product of antecedent dispositions for or against the religious activity in question, rather than the product of an impartial weighing of "objective" evidence. Because this approach necessarily requires courts to make difficult calculations which, even in the end, are inherently non-verifiable, its value is extremely limited.

Nor can the neutrality principle be salvaged by trying to focus on more objective ramifications of its application. For example, let us suppose hypothetically a legislative action which creates an environment in which a religious community flourishes, thus leading to a *verifiable* conclusion (measured, for instance, by membership statistics) that the government action promotes the welfare of that religious group. On the other hand, suppose that the government's refusing to take the action in

question results in the religious community's being adversely affected -- again, in some verifiable way. In the former case, the government could be criticized for having taken a measure that "endorses" religion, which the neutrality principle does not permit. In the latter case, the government's withholding action could be criticized for "inhibiting" religion -- a similarly impermissible result. The neutrality principle can thus be applied defensibly in both cases to reach two contradictory and incompatible results.

The problem, of course, is that the term "neutrality" has fluctuating connotations depending upon which outcome is envisaged when the analysis begins. In other words, it is impossible to arrive in a principled way at a baseline measure of religious neutrality. Deciding where to set the neutrality baseline, decides the issue -- yet deciding where to begin is not a principled calculation. It appears, rather, to depend upon whether a court is inclined, in the first instance, to uphold or strike down the government activity in question. Thus, "[w]hen we wish to strike down a practice it forbids, we invoke [the *Lemon* test]," but "when we wish to uphold a practice it forbids, we ignore it entirely." *Lamb's Chapel*, 113 S. Ct. at 2150 (Scalia, J., concurring in the judgment). Professor Bobbitt has made the point this way: "As a principle, a neutrality thesis is no help in this matter, because we have no adequate notion of generality on which a neutrality thesis, if it is to guide decision, must depend.... Robbed of a standard of generality, the rule of neither advancing nor inhibiting religion is crippled." P. BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 208 (1982). We are thus left with "the strange Establishment Clause geometry of crooked lines and wavering shapes [which *Lemon's*] intermittent use has produced." *Lamb's Chapel*, 113 S. Ct. at 2150.

4. Whereas previous eras viewed religion as an influence that is essential to civilized society, the current requirement that government remain completely neutral with respect to the religious choices of its citizens suggests, strangely, that a wholly secular society should be our collective aspiration. This per-

spective flies in the face of everything we know about the purpose of the Establishment Clause. In this connection, Justice Stewart's dissent in *Abington School District* has particular currency. He viewed that decision "not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at least government support for the beliefs of those who think that religious exercises should be conducted only in private." 374 U.S. at 313 (Stewart, J., dissenting). Justice Goldberg expressed the same fear: "[U]ntutored devotion to the concept of neutrality can lead to ... results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Id.* at 306 (concurring opinion, joined by Harlan, J.). See also, by analogy, Religious Freedom Restoration Act of 1993, *supra* ("laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise").

Contrary to the "best of our traditions" (*Zorach*, 343 U.S. at 314), neutrality and separation reflect a conception of religion that is wholly unconnected to government and other institutions of public life. For this reason we urge the Court to re-think the *Lemon* test and the neutrality principle which is its foundation.

II. ACCOMMODATION OF RELIGION IN CIVIC LIFE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE, ABSENT DIRECT OR INDIRECT COERCION BY THE GOVERNMENT.

1. The fundamental problem with the *Lemon* test and the neutrality principle which undergirds it, is that the test yields inconsistent results depending upon the baseline of neutrality from which courts begin their analyses. For this reason, we urge the Court to adopt a different test -- one which more adequately satisfies the dual requirements of "principled adjudication and fidelity to the Constitution." A.GOLDBERG, *EQUAL JUSTICE* 71 (1971). In addition to being logically sound and

capable of consistent application, an appropriate substitute for the *Lemon* test must harmonize with the contemporaneous understanding of the import of the text it purports to illumine. "The line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." *Abington School District v. Schempp*, 374 U.S. at 294 (Brennan, J., concurring). This Court has "declined to construe the Religion Clauses" in a way "that would undermine the ultimate constitutional objective as illuminated by history." *Walz v. Tax Commission*, 397 U.S. at 671.

A principle which satisfies these requirements focuses attention on whether any form of government coercion or compulsion is a factor in the government action under challenge. See generally, M. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986). This element of the church-state issue was the principal concern when the matter was considered by the First Congress. James Madison, who led the debate on the First Amendment in Congress, "apprehended the meaning of the [Religion Clauses] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 ANNALS OF CONGRESS 730 (J. Gales ed. 1934) (Aug. 15, 1789). Arguing that the proposed amendment was not intended to inhibit religion, Madison stated that he "believed that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 731. See *McGowan v. Maryland*, 366 U.S. 420, 441 (1961). The notion of compulsion was at the heart of Madison's interpretation of the Religion Clauses. It was *compelled* religious exercises which violated the First Amendment.

In his famous *Memorial and Remonstrance Against Religious Assessments*, Madison said that a proposed tax for Christian teachers in Virginia was an impermissible establishment because religion "can be directed only by reason and conviction, not by force or violence," and that "compulsive

support" of religion is "unnecessary and unwarrantable." Madison, *A Memorial and Remonstrance Against Religious Assessments* ¶¶ 1, 3, 4 (June 20, 1785). Thus, compulsion was viewed as "the essence of an establishment." McConnell, *supra*, at 937. Similarly, Thomas Jefferson's *Virginia Bill For Religious Liberty* provided in part: "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested or burthened, in his body or good, nor shall otherwise suffer on account of religious belief. 12 Hening, Statutes of Virginia 84 (1923) (quoted in *Everson*, 333 U.S. at 13).

The Founders contemplated that the Religion Clauses would ensure the accommodation of government toward religion necessary to protect the liberties which were the overriding concern of the First Congress. "The proscribed area would be limited to the narrow ground of compulsion in matters of belief and of elevating a particular sect or combination of sects to governmentally mandated primacy in a society characterized by a healthy diversion of religious viewpoints and affiliations." K. Starr, Annual Lecture For The Supreme Court Historical Society 14 (May 18, 1987).

Many pronouncements by this Court have been consistent with this rendering of the Establishment Clause. For example, in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court interpreted the Establishment Clause as "forestal[ling] compulsion by law of the acceptance of any creed or the practice of any form of worship." *Id.* at 303. Similarly, in *McCollum v. Board of Education*, 333 U.S. 203 (1948), public school release time programs and Sunday closing laws were reviewed by looking for an element of coercion. The issue of coercion was likewise the focus of the Court's analysis in such landmark cases as *Everson*, 330 U.S. at 15-16; *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961) ("To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."); *Estate of Thornton v. Caldor, Inc.*,

472 U.S. 703, 710 (1985)("unyielding" preference for Sabbath Observers required fellow employees to "conform their conduct to [others'] religious necessities"(citation omitted)); *McGowan v. Maryland*, 366 U.S. at 441 (1961).

In contrast to the neutrality principle's inconsistent results, an approach centered upon the notion of coercion lends rationality to the diversity of religious activities which, over the course of time, have been accepted as part of our national culture: "the appointment of congressional chaplains, the provision in the Northwest Ordinance for religious education, the resolutions calling upon the President to proclaim days of prayer and thanksgiving, the Indian treaties under which Congress paid the salaries of priests and clergy, and so on." McConnell, *supra*, at 939. "These actions, so difficult to reconcile with modern theories of the Establishment Clause, are much easier to understand if one sees religious coercion as the fundamental evil against which the clause is directed." *Ibid.*

2. The parameters of an approach which makes direct or indirect coercion the linchpin of Establishment Clause analysis have been sketched by Justice Kennedy, who discerns two "limiting principles" from the Court's cases: (1) "government may not coerce anyone to support or participate in any religion or its exercises," and (2) "it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion to such a degree that it establishes a state religion or tends to do so." *County of Allegheny*, 492 U.S. at 659-660 (Kennedy, J., concurring in the judgment in part and dissenting in part). See also Brief For The United States As Amicus Curiae Supporting Petitioner at 15, *Lee v. Weisman* (No. 90-1014)(The Lemon test should be replaced "by a single, careful inquiry into whether the practice at issue provides direct benefits to a religion in a manner that threatens the establishment of an official church or compels persons to participate in a religion or religious exercise contrary to their consciences.")

As Justice Kennedy noted in his opinion in *Allegheny*: "These two principles are related, for it would be difficult

indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing." 492 U.S. at 659-60 (concurring in part and dissenting in part).

We do not mean to suggest, of course, that a coercion standard would eliminate all difficulties in this area. As Justice White has written, "Establishment Clause cases are not easy" because "they stir deep feelings." *Committee For Public Education v. Regan*, 444 U.S. 646, 662 (1981). But such a standard has at least three virtues over the *Lemon* test: It may be applied coherently; it is grounded on the historically sound premise that religion influences civic life in important and positive ways; and it reflects the contemporaneous understanding of the Framers. A coercion standard will thus focus attention on legislative actions which pose a realistic threat to Establishment Clause values.

3. Viewed in this framework, the legislation at issue in this case does not violate the Establishment Clause. There is no suggestion here that the government's power to coerce has been used to further the interests of Judaism. No one was compelled to observe or participate in any religious activity. Nor is there any indication that this represents a first step toward an establishment of religion. Chapter 748 is merely an accommodation of the needs of a community of devoutly religious people whose disabled children require the same sorts of educational facilities as do the disabled children of other public school districts.

Thus, the New York Legislature's action "falls well within the tradition of government accommodation which has marked our history from the beginning." *County of Allegheny*, 492 U.S. at 663 (Kennedy, J., concurring in part and dissenting in part). See *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 144-45 (1987) ("The government may (and sometimes must) accommodate religious practices ... and may do so

without violating the Establishment Clause."); *Lynch*, 465 U.S. at 673 (The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions...").

Religious pluralism is a tradition firmly rooted in our culture and one of the great strengths of American society. At a time in our history when the moral condition of our people has never been in greater need of attention, we urge the Court to embrace an Establishment Clause formula which more effectively accommodates religious practices and communities, and thus properly countenances the vital role that religion plays in the moral health of our Nation.

CONCLUSION

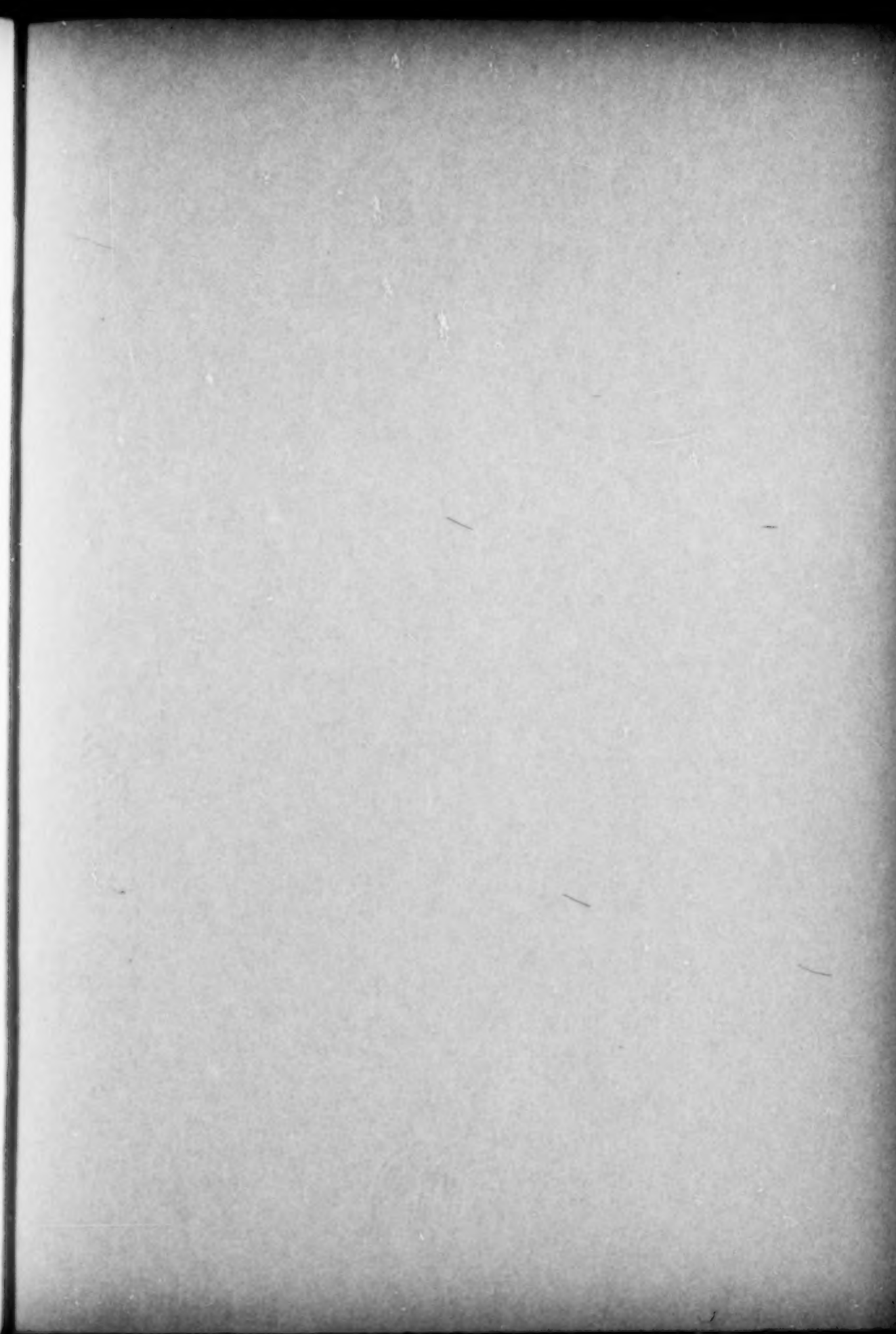
For the foregoing reasons, the decision of the New York Court of Appeals should be reversed.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE
KIRYAS JOEL VILLAGE SCHOOL DISTRICT,

Petitioner,

v.

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

ON WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

BRIEF OF
AGUDATH ISRAEL OF AMERICA
AS AMICUS CURIAE
IN SUPPORT OF BOARD OF EDUCATION OF THE
KIRYAS JOEL VILLAGE SCHOOL DISTRICT

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IN THE
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INTEREST OF THE AMICUS CURIAE

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish movement. As an advocate for Orthodox Jewish interests, and especially for the educational needs of Orthodox Jewish children, Agudath Israel has a great interest in both the outcome of this specific case and the Court's resolution of the broader thematic issues the case raises.

Many of the issues that affect Orthodox Jews in the United States arise along the boundary between church and state. This case is a good example. While its specific fact pattern is unique, some of its features are all too common: the refusal of local governmental entities adequately to accommodate the needs of minority religious communities; the frustration of a statutory mandate that all children, regardless of their religious background, receive education related services equitably; the diminution of religious freedom through an overly rigid application of the constitutional proscription against governmental establishment of religion.

The specific issue before the Court is the constitutionality of Chapter 748 of New York State's Laws of 1989, a remedy devised by the New York State legislature to resolve the impasse that had precluded the handicapped children of the Village of Kiryas Joel from receiving their statutory educational due. The Court's resolution of this issue is likely to have a profound impact not only on the handicapped Hasidic children whose educational future is directly at stake, not only on the broader community of Orthodox Jews whose strict observance of their faith frequently leads them to seek religious accommodations, but also on the numerous religious minority communities in this nation whose ways of life are jeopardized when governmental "neutrality" effectively translates into governmental hostility.

Agudath Israel's interest in this case extends also to the underlying cause for the impasse that led to the enactment of Chapter 748: this Court's rulings in

Aguilar v. Felton, 473 U.S. 402 (1985), and *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), which have had a devastating impact on many children in the Orthodox Jewish community and other faith groups. This case illustrates how far-reaching are the *Felton / Grand Rapids* aftershocks, and affords the Court an opportunity to reflect once again on the wisdom of the holdings in those cases.

Accompanying this brief is a letter dated January 4, 1994, by which counsel for petitioner Board of Education of the Kiryas Joel Village School District consented to the filing of an *amicus* brief by Agudath Israel in support of petitioners. By letter dated December 17, 1993, which is on file with the Court, counsel for all other parties have so consented as well.

ARGUMENT

"Certainly," this Court observed in *Wolman v. Walter*, 433 U.S. 233, 247 n.14 (1977), "the Establishment Clause should not be seen as foreclosing a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community." The handicapped children of Kiryas Joel encountered precisely such logistical difficulties; and Chapter 748 represents precisely such a practical response. The courts below were wrong to conclude that the Establishment Clause forecloses the legislature's response.

Mindful of the admonition that "[a]n *amicus* brief which does not serve [the purpose of bringing relevant matter to the attention of the Court] simply burdens

the staff and facilities of the Court and its filing is not favored," Rule 37.1, *Rules of the Supreme Court of the United States* (1990), we confine our argument to two short thematic points. Beyond those points, we note for the record our support for the views and analysis of the dissenting judges in the courts below (*Grumet v. Board of Education of the Kiryas Joel Village School District*, 187 A.D. 2d 16, 25, 592 N.Y.S. 2d 123, 131 (3d Dept. 1992) (Levine, J., dissenting); *Grumet v. Board of Education of the Kiryas Joel Village School District*, 81 N.Y.2d 518, 545, 601 N.Y.S.2d 61,77 (1993) (Bellacosa, J., dissenting)); and our general concurrence with the many jurists and scholars who have called for a re-evaluation of "the aptly named *Lemon* test," Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 Geo. Wash. L. Rev. 645, 654 (1992).

I.

TO UPHOLD THE DECISION BELOW, ESPECIALLY IN THE WAKE OF THE COURT'S RECENT FREE EXER- CISE JURISPRUDENCE, WOULD LEAVE MINORITY RELIGIOUS PRACTITIONERS AND COMMUNITIES EXTREMELY VULNERABLE

Agudath Israel, like many other religious groups throughout the nation, shuddered to read the Court's words in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990):

"Values that are protected against govern-
ment interference through enshrinement in

the Bill of Rights are not thereby banished from the political process....[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. *It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of religious beliefs.*" [Emphasis added.]

As chilling as *Smith's* message is to devotees of "religious practices that are not widely engaged in," the chill would become a deep freeze were the Establishment Clause given the type of expansive construction offered by the majorities below.

The background leading to the passage of Chapter 748, and indeed the substance of Chapter 748 itself, confirm the accuracy of *Smith's* observation about the "relative disadvantage" faced by minority religionists. Based on the traumatic experiences of the Hasidic children who did spend some time in its public school special education classes, the Monroe-Woodbury Central School District had full knowledge that its public schools were not the most appropriate environment in which to provide special education to the

handicapped children of Kiryas Joel. Yet the school district continued to insist that the children come to the public schools -- even after the New York Court of Appeals rejected its legal contention that it had no statutory authority to provide the special education services outside the regular public school classes, *Board of Education of the Monroe-Woodbury Central School District v. Wieder*, 72 N.Y.2d 174, 531 N.Y.S.2d 889 (1988). In short, the school district asserted its majoritarian authority to refuse accommodation of the special education needs of a religious minority.

And so, put in a position where they could neither compel nor persuade the Monroe-Woodbury Central School District to accommodate their needs, the Villagers of Kiryas Joel did precisely what *Smith* would have encouraged Native Americans seeking accommodations of their peyote rituals to do: turn to the legislature for relief.

For all of the talk in the courts below about Chapter 748 as an "endorsement" of a particular denomination, the nature of the remedy fashioned by the legislature was surely less than ideal from the perspective of the Hasidim. It imposed on the Village the new duty of establishing its own school board; and it imposed on the school board (and the public school created by the school board) all the secular legal obligations of New York State law -- including obligations generally foreign to the Hasidic way of life. Further, it gave rise to the likely eventuality that the new Kiryas Joel Village School District would have to establish a regular non-handicapped public school for children whose non-Hasidic families would move into

the Village and demand regular public schooling. Neighborhoods can change, it should be recalled, even as laws remain the same.

No doubt the Hasidim would have been delighted had the legislature accommodated their special education needs through the type of "narrowly tailored legislation" suggested by Chief Judge Kaye in her concurring opinion below, 81 N.Y.2d at 539: "a law providing that the Monroe-Woodbury School District should furnish special education services to these children at sites not physically or educationally associated with their parochial schools." Apparently, however, that approach was deemed politically unfeasible -- presumably the Monroe-Woodbury Central School District, consistent with its obstinate insistence that it would service the handicapped children of Kiryas Joel only in its own public schools, would have opposed such legislation -- and the only solution that gained sufficient political support to break the impasse was to carve out a separate school district for Kiryas Joel. This was not a perfect solution, by any means, but the only solution that was politically doable, the only solution that addressed the urgent needs of some 200 handicapped children for special education services in a culturally compatible setting designed to maximize their educational progress.

Justice (now Chief Justice) Rehnquist, dissenting in *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), commented on the increasing "tension" between the two religion clauses of the First Amendment:

"[P]erhaps [the] most important cause of the tension is our overly expansive interpretation of *both* Clauses. By broadly construing both Clauses, the Court has constantly narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny." 450 U.S. at 721 (Rehnquist, J., dissenting; emphasis in original).

In the wake of *Smith*, the channel has been partially enlarged; constitutionally based free exercise claims to compulsory accommodation have all but been eviscerated, placing minority religious practitioners at the mercy of legislative and local governmental authorities. But as this case shows, even when such authorities are inclined to display mercy, the still broad view of the Establishment Clause hangs over any attempts at accommodation like a Sword of Damocles.

In *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 144-45 (1987), the Court spoke of its longstanding recognition "that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *See also, e.g., Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987). Despite the universal recognition of this general principle, courts have expressed varying degrees of deference toward legislative efforts to accommodate the needs of religious committees, with some all too eager to find that such efforts have an impermissible primary effect of "advancing religion" or creating a "symbolic union" between church and state.

See generally Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673 (1980); McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1 (1985).

Locating with precision the point at which permissible accommodation ends, and impermissible establishment begins, is concededly no simple task. We believe that Chief Justice Rehnquist had it right when he suggested in his *Thomas* dissent that "governmental assistance which does not have the effect of inducing religious belief, but instead merely accommodates or implements an independent religious choice does not impermissibly involve the government in religious choice and therefore does not violate the Establishment Clause of the First Amendment." *Thomas v. Review Board*, *supra*, 450 U.S. at 727 (Rehnquist, J., dissenting; internal quotations deleted).

Failure to permit legislative bodies ample and generous leeway under the Establishment Clause to accommodate the special needs of minority religious practitioners and communities, especially in this brave new post-*Smith* world of diminished constitutional protection for religious free exercise, would only hasten what Professor Stephen L. Carter has referred to as "[t]he potential transformation of the Establishment Clause from a guardian of religious liberty into a guarantor of public secularism." Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*, at 122-23 (Basic Books 1993). We share Professor Carter's view that such transformation "raises prospects at once dismal and dreadful." *Id.* at 123.

II.

**THIS CASE AFFORDS THE COURT OPPORTUNITY
TO REFLECT UPON THE BITTER LEGACY OF ITS
RULINGS IN *FELTON* AND *GRAND RAPIDS***

Although we believe that Chapter 748 is a constitutionally acceptable legislative resolution of the problem facing handicapped children in Kiryas Joel, we readily concede that it is an extraordinary resolution. And, as noted above, it is far from an ideal resolution.

That the legislature saw fit, and necessary, to fashion such an unusual remedy points to a striking aspect of this case, one the Court would do well explicitly to consider. Prior to 1985, the Monroe-Woodbury Central School District provided special education services to the handicapped children of Kiryas Joel by sending public school personnel to an annex of one of the religious schools in the Village. However, after this Court's companion rulings in *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*, 473 U.S. 402 (1985), prohibiting public school teachers from entering religious school premises to provide statutorily mandated remedial education services, the school district concluded that it could no longer continue this arrangement. Thus was launched the extraordinary odyssey that at long last has brought the parties to this Court today -- with stops along the way for bitter negotiations that led to nowhere, several rounds of acrimonious litigation in the state courts, and a visit to the state capitol in Albany for some extraordinary legislative relief.

When *Felton* was decided, Chief Justice Burger commented on the practical implications of the ruling:

"Under the guise of protecting Americans from the evils of an Established Church such as those of the 18th century and earlier times, today's decision will deny countless schoolchildren desperately needed remedial teaching services funded under Title I. The program at issue covers remedial reading, reading skills, remedial mathematics, English as a second language, and assistance for children needing special help in the learning process. The 'remedial reading' portion of this program, for example, reaches children who suffer from dyslexia, a disease known to be difficult to diagnose and treat. Many of these children now will not receive the special training they need, simply because their parents desire that they attend religiously affiliated schools.... I cannot join in striking down a program that, in the words of the Court of Appeals, 'has done so much good and little, if any, detectable harm'." 473 U.S. at 419-20 (Burger, C.J., dissenting).

Justice O'Connor, in a similar vein, offered the following observation:

"For these children, the Court's decision is tragic. The Court deprives them of a program that offers a meaningful chance at success in life, and it does so on the untenable theory that public school teachers (most of whom

are of different faiths than their students) are likely to start teaching religion merely because they have walked across the threshold of a parochial school. I reject this theory and the analysis in *Meek v. Pittenger* on which it is based. I cannot close my eyes to the fact that, over almost two decades, New York City's public school teachers have helped thousands of impoverished parochial school children to overcome educational disadvantages without once attempting to inculcate religion. Their praiseworthy efforts have not eroded and do not threaten the religious liberty assured by the Establishment Clause." *Id.*, 473 U.S. at 431 (O'Connor, J., dissenting).

Eight-and-a-half years later, it has become apparent that *Felton* and *Grand Rapids* have had negative impacts that extend considerably further even than the dissenting Justices at that time envisioned -- not just in the context of statutorily mandated remedial education services to religious school students, but also in the context of cases like this one involving special education services for the handicapped.

In 1987, Agudath Israel called on Congress to take steps to help alleviate the post-*Felton* problems, which had become apparent already then. We summarized those problems under four broad headings:

"These, then, are the problems created by *Felton*: (1) decreased participation by nonpublic schools students in the Chapter 1 pro-

gram; (2) academically and socially unsatisfactory off-premises alternate service delivery mechanisms for students who do participate; (3) staggering administrative expenses necessary to implement such off-premises services; and (4) heightened inter-community strife and tension." (Testimony of David Zwiebel on behalf of Agudath Israel of America, before the House Subcommittee on Elementary, Secondary and Vocational Education, March 30, 1987.)

Each of these four points, no less valid today than when Agudath Israel presented its congressional testimony, merits brief elaboration.

(1) *Decreased Participation*: In an August 1993 study, *Chapter 1 Services to Private Religious School Students: A Supplemental Volume to the National Assessment of the Chapter 1 Program* (hereafter referred to as the "Department of Education Study"), the U.S. Department of Education indicated that there was a considerable decline in the number of nonpublic school students participating in the Chapter 1 program in the years since *Felton* was decided -- dropping from approximately 185,000 in 1984-85, the year prior to the decision in *Felton*, to approximately 128,000 in 1985-86, and then gradually increasing to approximately 158,000 in 1990-91 (the last year for which figures were available). Department of Education Study at 9. The study shows that despite a broad array of alternative service delivery mechanisms developed in the aftermath of *Felton* -- e.g., mobile

vans parked near religious schools; other neutral sites; public school facilities; computer assisted instruction on religious school grounds -- the level of religious school student participation still has not reached pre-*Felton* numbers. *Id.* at 8.

(2) *Diminished Quality:* The Department of Education Study focused also on the quality of Chapter 1 services for nonpublic school children in the post-*Felton* era:

"Although the religious-school educators interviewed in the case studies said that their students benefitted from Chapter 1, they also said that services were better before *Felton*. They expressed concern about the physical and programmatic isolation of Chapter 1 from other school programs... As other studies have documented, the mobile units can be noisy, difficult to park and very cramped. At the risk of over-simplification, case study data suggest that good teachers were usually able to adapt to the limits imposed by the mobile units, but they seldom overcome them. Other teachers had difficulty adapting to the mobile units and ended up relying on a very limited repertoire of instructional activities. CAI [Computer Assisted Instruction] as a single service delivery option typically does not focus on advance thinking skills or expose students to challenging content, and students often have little or no direct contact with Chapter 1 instructional personnel. CAI in combination with other strategies appeared to

be an improvement, but there were difficulties in coordination and communication, which almost certainly detracted from the overall quality of the instructional program". *Id.* at 53-54.

Agudath Israel's own experience in dealing with Jewish nonpublic schools confirms these findings. Particularly with respect to off-premises services, the principals of these schools have complained that they face severe administrative and logistical problems. Those problems pale in comparison to the problems faced by students who have to put on their coats and boots in the middle of the school day to traipse along to some off-premises site for remedial education, who suffer displacement, disruption and discomfort, as well as a social stigma that negates much of the benefit of the Chapter 1 remedial program. And while computer assisted Chapter 1 instruction has gained some popularity in the schools we deal with, the overwhelming consensus of the principals is that there is no substitute, especially in remedial education, for face-to-face instruction and interaction.

(3) *Economic Costs*: Congress has appropriated many tens of millions of dollars to cover the costs needed to develop alternative service delivery mechanisms in the aftermath of the *Felton* ruling. Appropriations for capital expenses for fiscal years 1988-91 approached \$81 million. [Department of Education Study, at 43.] However, according to a 1989 GAO study, districts throughout the country incurred some \$105 million in eligible expenses through 1988-89, *id.* -- thereby requiring state and local governments to

make up the additional costs either through special local allocations, or directly out of Chapter 1 educational funds.

Several courts have ruled that special expenses incurred by school districts in implementing the necessary alternative service delivery mechanisms must be borne by the Chapter 1 program as a whole, not just by that portion of the program allocated to nonpublic schools. *Board of Education of City of Chicago v. Alexander*, 983 F.2d 745 (7th Cir. 1992); *Barnes v. Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991). Thus, *Felton's* impact has been felt not only in the nonpublic school sector, but even in the public schools, from which vitally important Chapter 1 dollars have been siphoned off to cover alternative service delivery mechanisms for nonpublic school children.

(4) *Inter-community strife*: This case, and several others that have arisen in the post-*Felton* era (see, e.g., *Parents' Association of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986)), point to one of the most tragic ironies of the *Felton* decision: It has engendered precisely the types of "political divisiveness along religious lines" that Justice Brennan's majority opinion, 473 U.S. at 414, claimed it was designed to avoid. See also Justice Powell's concurring opinion in *Felton*, 473 U.S. at 416. So long as *Felton* remains the law of the land -- and local education officials struggle to balance the competing requirements of providing religious school children with equitable Chapter 1 services while avoiding anything that might cross the line into forbidden establishment of religion, all the

while trying to achieve both goals within reasonable budgetary constraints -- conflict is likely to arise again and again.

The constitutionality of public school teachers entering religious school premises for the purposes of delivering remedial or special education services is not now directly before this Court. However, as should be readily apparent by the background that led up to this litigation, the ideal solution to the problem faced by the 200 handicapped children of Kiryas Joel -- and the problem faced by thousands of nonpublic school students who have been deprived, qualitatively and quantitatively, of statutorily mandated special education or remedial education services; and the problem faced by the many hundreds of thousands of public school students whose funds for such services are being eaten away by the "off-the-top" costs of providing the alternative service delivery mechanisms required by *Felton*; and the problem faced by all taxpayers who have been forced to bear the extra burden of enormous special legislative expenditures to help meet those additional costs -- the ideal solution would be for the Court to reconsider its justly maligned 5-4 rulings in *Felton and Grand Rapids*. And while the Court cannot directly do so in this case, it can offer signals.

SUMMARY OF ARGUMENT AND CONCLUSION

The importance of this case transcends the narrow and unusual context in which it arises. Its resolution may well determine whether religious practitioners and communities can turn with confidence to legislative bodies for accommodation of their special needs.

Asymmetrical applications of the First Amendment's two religion clauses would pose a great threat to the interests of minority religious communities like the Hasidic Jews of Kiryas Joel. If the Free Exercise Clause is to be given so narrow a construction that minority religionists will typically not be able to look to the Constitution as a shield for protection of their religious freedoms, then the Establishment Clause ought not be given so broad a construction that opponents of religious freedom will be able to use the Constitution as a sword against legislative efforts at accommodation.

This case further demonstrates what lies at the bottom of the slippery slope created by this Court's ill-conceived rulings in *Felton* and *Grand Rapids*. In addressing the constitutionality of Chapter 748, the Court would also do well to take note of the flawed jurisprudence that precipitated the Kiryas Joel crisis in the first place.

For the reasons set forth in the dissenting opinions below, and in view of the considerations set forth

herein, Agudath Israel of America respectfully urges that the decision below be reversed.

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**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term 1993

**BOARD OF EDUCATION OF THE KIRYAS JOEL
VILLAGE SCHOOL DISTRICT, BOARD OF
EDUCATION OF THE MONROE-WOODBURY
CENTRAL SCHOOL DISTRICT, and ATTORNEY
GENERAL OF THE STATE OF NEW YORK,**

Petitioners,

v.

LOUIS GRUMET AND ALBERT W. HAWK,

Respondents.

**On Writ of Certiorari to the
New York Court of Appeals**

**BRIEF OF NATIONAL COUNCIL OF CHURCHES
OF CHRIST IN THE U.S.A. AND
JAMES E. ANDREWS AS STATED CLERK OF THE
GENERAL ASSEMBLY OF THE
PRESBYTERIAN CHURCH (U.S.A.) AS AMICI
CURIAE IN SUPPORT OF RESPONDENTS**

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Secondary Authority

- Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990) 8, 10
- Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1 (1989) 10
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INTEREST OF THE AMICI

The National Council of Churches of Christ in the U.S.A. is a community of thirty-two Protestant and Eastern Orthodox communions having an aggregate membership in the United States of over forty million. Its positions on public issues are taken on the basis of policies developed by its General Board, composed of some two hundred and fifty members selected by its member communions in proportion to their size and support of the Council. This brief implements the Council's longstanding commitment to separation of religious and political authority and to protecting religious liberty from burdensome or discriminatory regulation.

James E. Andrews, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with approximately 2,856,713 members in 11,500 congregations organized into 171 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706.

This brief is consistent with the policies adopted by the General Assembly regarding the Establishment Clause of the First Amendment. The 200th General Assembly of the Presbyterian Church (U.S.A.) addressed these issues in 1988: "We reject and oppose any attempts on the part of the church to exercise political authority . . ." Presbyterian Church (U.S.A.), *God Alone Is Lord of the Conscience*, A Policy Statement Adopted by the General Assembly 52 (1988). Creation of the Kiryas Joel Village School District as a governing entity violates this principle.

But this does not mean that government cannot aid the disabled children of Kiryas Joel:

Government payments on behalf of individuals, under programs such as Medicare, Medicaid, and scholarship assistance, should without exception be available to clients and students at church-sponsored agencies and institutions on exactly the same terms as if those patients or clients were receiving their services from secular entities. . . . Where government provides noncurricular services to both public and private schools that involve the itineration of public employees to the institutions, schools sponsored by religious organizations should not be excluded.

Id. at 31-32.

The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

SUMMARY OF ARGUMENT

This case involves a deliberate and successful effort to confer governmental power on a religious community, and the resulting combination of religious and governmental power violates the core of the Establishment Clause. But the Satmar Hasidim's legitimate need for accommodation can be fully met by providing publicly funded services for disabled children at a site off the campus of the Satmar's private religious school. On these two points, we adopt by reference parts I, II, III, and VI of the brief of the American Jewish Congress *et al.* as Amici Curiae.

We file separately from the American Jewish Congress brief so that we may address the parties' dispute over the *Lemon* test and the endorsement test. The second prong of the *Lemon* test originated in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), as an attempt to elaborate the requirement of government neutrality toward religion. The *Schempp-Lemon* formulation had the unintended consequence of disaggregating the neutrality inquiry into two separate inquiries: Has government advanced religion? And, has government inhibited religion? This disaggregation suggests that there is a constitutional violation anytime a policy may be said to advance religion, even if the only alternative policy would severely inhibit religion. It is this disaggregation of the neutrality inquiry that leads petitioners, and some lower courts, to conclude that the *Lemon* test prohibits any effort to accommodate the needs of religious minorities, or even that it requires government to discriminate against observant religious believers.

This Court has never misunderstood the *Schempp-Lemon* test in this way. The Court has held in many

contexts that government does not establish religion by eliminating governmentally imposed burdens on religious observance, and that discrimination against religious minorities is not required and is often forbidden.

What is needed to resolve the difficulties raised by petitioners is to clarify the second prong of the *Lemon* test to restate the Court's original intention: the goal is government neutrality toward religion. The search for neutrality requires that any effects of a policy that tend to advance religion be compared to any effects of alternative policies that tend to inhibit religion. It is rarely possible for government to achieve absolutely no effect on religion. The best government can do is to minimize its effects on religion; more specifically, government should minimize the extent to which it either encourages or discourages religious belief or practice.

The *Lemon* test would benefit from this clarification. But the underlying requirement that government be neutral toward religion is essential to religious liberty; it is critical that the Court not cast any doubt on that basic requirement.

The endorsement test requires similar clarification. The endorsement test is essential in cases involving government speech or symbolic conduct; in those cases, endorsement goes to the heart of the issue. But it is misleading to extend the endorsement test to government policies with more tangible consequences. If government policy has tangible consequences, and if those consequences come as close to neutrality as it is possible to come, then the policy is constitutional and courts should not speculate about implicit or symbolic endorsements.

ARGUMENT

I. Creation of the Kiryas Joel Village School District Was Unconstitutional Because It Deliberately Combined Religious and Governmental Power.

Amici entirely agree with parts I, II, and III of the Brief of the American Jewish Congress *et al.* as Amici Curiae; we adopt parts I, II, and III of that brief by reference. This case involves a deliberate and successful effort to confer governmental power on a religious community, and the resulting combination of religious and governmental power violates the core of the Establishment Clause. This point is dispositive of the case; we will not burden the Court by restating it here in different words.

II. Affirmance Here Would Not Preclude Accommodation of the Needs of the Disabled Children of Kiryas Joel.

The Satmar Hasidim's legitimate need for accommodation can be fully met under this Court's cases by providing publicly funded services for disabled children at a site off the campus of the Satmar's private religious school. On this point, we adopt by reference part VI of the brief of the American Jewish Congress.

III. The *Schempp-Lemon* Test and the Endorsement Test Are Sound in Principle. They Would Be Improved by Clarifying Their Details.

Instead of a straightforward analysis based on the combination of religious and governmental power, the New York Court of Appeals relied on the second prong of the *Lemon* test and on the endorsement test. *Grumet v. Board of Education*, 618 N.E.2d 94, 99 (N.Y. 1993). The Court of Appeals' analysis is neither necessary nor helpful in this case.

All three petitioners read the Court of Appeals to hold that government advances and endorses religion any time it accommodates the needs of religious minorities. To the extent that the opinions below are susceptible of that reading, they are wrong. Despite some language that tends toward such conclusions, we do not think that is what the opinions below held. The Court of Appeals recognized that the Satmars are entitled to publicly funded services for their disabled children on sites away from the campus of their private religious schools. It is therefore obvious that the Court of Appeals does not think that all accommodations are unconstitutional. Rather, the Court of Appeals held that New York had conferred benefits that go far beyond restoring disabled Satmar children to equal participation in programs for the disabled. Benefits not necessary to accommodation cannot be justified as accommodation; they are likely to be an establishment.

The opinions below and the petitioners' briefs highlight a continuing source of confusion in the *Schempp-Lemon* test and in the endorsement test. We believe that the basic principle underlying these tests is sound; the confusion comes from ambiguities in the details of the

Schempp-Lemon formulation of the test and from uncertainty about the scope of the endorsement test. This case, involving a violation of the fundamental rule against combining religious and governmental power, presents no occasion to fine tune the language of doctrinal formulations. But if the Court chooses to address the *Schempp-Lemon* test in this case, it should recognize that nothing more than fine tuning is required.

A. The *Schempp-Lemon* Test

The Court of Appeals relied on the second prong of the *Lemon* test: that the statute's principal or primary effect must neither advance nor inhibit religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). This part of *Lemon* was taken almost verbatim from *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). The Court in *Schempp* explicitly offered the test as an elaboration of "the wholesome 'neutrality' of which this Court's cases speak." *Id.* Government was not to depart from neutrality in either direction; it was neither to advance nor inhibit religion.

The *Schempp-Lemon* formulation of the neutrality requirement has had unintended consequences. The *Schempp-Lemon* formulation can be read to disaggregate the search for the most nearly neutral course into two separate inquiries: Has government advanced religion? And, has government inhibited religion? It is possible to ask these two questions separately, and it is therefore possible to ask either without asking the other. And so by an inadvertent linguistic substitution, many lower courts now ask whether government has advanced religion, instead of asking whether government has departed from neutrality.

This disaggregation of the neutrality inquiry is a mistake:

Because absolute zero is not achievable, it is always possible to find some effect of advancing or inhibiting religion. Thus, if you look at only one side of the balance, you can always find a constitutional violation. . . .

Substantive neutrality always requires that the encouragement of one policy be compared to the discouragement of alternative policies. . . . By disaggregating neutrality, the Court has lost sight of its original objective.

Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1007-08 (1990).

The basic point is clearly illustrated in this case. Because of their religious beliefs and practices, Satmar children are unable to attend a public school with other children. Some of these Satmar children also have disabilities, and they are entitled to publicly funded services for the disabled under programs administered through schools. There is thus an unavoidable conflict between the practices of the non-Satmar majority and the Satmar minority. What is the most nearly neutral government response to this conflict?

One possibility is to provide publicly funded services to the disabled Satmar children at a site where they can participate, separated from the other children. Considered in isolation, this might be thought to advance

Satmar Hasidism. But this possibility cannot be considered in isolation; it must be compared to the alternative. The alternative is to tell Satmar children that they cannot get publicly funded services for the disabled unless they give up core practices of their faith. This would plainly inhibit Satmar Hasidism. Moreover, the inhibiting effect of withholding services from disabled children would far exceed the advancing effect of providing those services at a site away from the main campus of the public school.

Thinking about the incentives created by each alternative makes clear which alternative would be the greater departure from neutrality. It is almost impossible to imagine non-believers converting to Satmar Hasidism in order to send their disabled child to a different building. If public services are available to disabled children of all faiths, the way in which the services are delivered creates no incentive to change faiths. But it is easy to imagine parents abandoning Satmar Hasidism, or relaxing their family's observance of the faith, if that is the only way to get an education for their disabled child. Withholding services from the disabled would place enormous governmental pressure on religious choices, penalizing the religious choices of those who adhere to the faith, and successfully coercing the religious choices of those who succumb to the government's pressure. It is far more nearly neutral to provide the services at a separate site than to provide them in such a way that families must abandon the practice of their faith in order to participate.

Another useful way to clarify the choice between these two alternatives is this: Providing services for disabled children in a way that enables the Satmar to participate removes a burden from the practice of Satmar Hasidism. But removal of the burden is relevant only to

those who are already attracted to the faith. Unlike government prayers or religious observances, removing a burden cannot motivate anyone to be attracted to the burdened faith in the first place. But imposing a burden can motivate people to leave the faith, and it can penalize them for staying in. It is usually more nearly neutral to remove burdens than to impose them.

The standard applied in the foregoing analysis is that the goal of government neutrality toward religion should be to minimize government influence on religious choices. Scholars on both sides of this case have agreed on that basic standard. "[T]he religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance." Laycock, *supra*, 39 DePaul L. Rev. at 1001. "Government is not free to promote or discourage [religion]. . . . Effects on religious practice must be minimized . . ." Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 14 (1989).

This underlying principle of neutrality toward religion is sound, and it is well-established in the opinions of this Court. The neutrality principle is violated here by the permanent alliance of religion and government in the Kiryas Joel Village School District. New York has not merely lifted a burden from the Satmar; it has not merely found a means to provide equal access to public services for their disabled children. New York has conferred on the Satmar all the governmental power of a New York school district: power to tax, to regulate teachers and students, to establish curriculum, even power to close the public schools. All these powers have been used: the district has no public school for children who are not

disabled. Cf. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964).

Even before these powers were used, creation of a separate political entity on religious lines had immediate and permanent effects, powerfully reinforcing private choices with the coercive powers of government. Private choice had created merely a group of Satmar living in close proximity. The boundary of their neighborhood was free to ebb and flow under the cumulative effect of private choices about religion and about real estate. It was the State of New York that fixed the boundary by law. A decision to buy or rent a home on one or the other side of the line now has dramatic legal and political consequences for the buyer -- consequences that did not attach to the informal edges of a neighborhood. To move into Kiryas Joel is not merely to acquire Satmar neighbors, but to submit to Satmar government. Fixing the boundary by law and allocating governmental power on either side of the boundary made the boundary permanent and coercive.¹

Neither the *Schempp-Lemon* test nor the language of neutrality is needed to explain what is wrong with combining religious and governmental power in these ways. But the more direct analysis of the case in the Brief of the American Jewish Congress is entirely consistent with both the neutrality standard in general and with the *Schempp-Lemon* formulation in particular. Conferring governmental power on the Satmar Hasidim establishes

¹ Similar but not identical analysis applies to the Village of Kiryas Joel, which was created by a quite different procedure. That issue is not before the Court.

their religion; providing services to their disabled children would not.

What is needed is not to overrule the *Schempp-Lemon* test, but to clarify it. This Court has never understood the *Schempp-Lemon* test to require discrimination against religion or to preclude government from lifting regulatory burdens on religion. Under this Court's cases, religious minorities may be exempted from burdensome regulation, *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), *Employment Division v. Smith*, 494 U.S. 872, 890 (1990), receive social services on an equal basis with other citizens, *Zobrest v. Catalina Foothills School District*, 113 S. Ct. 2462 (1993), *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), participate on an equal basis in the institutional delivery of social services, *Bowen v. Kendrick*, 487 U.S. 589 (1988), *Bradfield v. Roberts*, 175 U.S. 291 (1899), and speak in public places on an equal basis with other speakers, *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993), *Board of Education v. Mergens*, 496 U.S. 226 (1990), *Widmar v. Vincent*, 454 U.S. 263 (1981).

It is only the unintended ambiguity of the *Schempp-Lemon* formulation that has led some advocates and lower courts to think that the Constitution requires or permits discrimination against religion. The Court would do well to clarify that the inquiry into advancement can never be separated from the inquiry into inhibition -- that these are inseparable components of a single inquiry into neutrality.

B. The Endorsement Test

The endorsement test is not relevant here. The proper domain of the endorsement test is government speech and symbolic conduct. It is no accident that the endorsement test originated in a creche case, *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring), and that the Court has applied it principally in cases involving speech or religious observance. *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (moments of silence); *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (curriculum); *County of Allegheny v. ACLU*, 492 U.S. 573, 592-94, 601 (1989) (religious displays); see also *Lee v. Weisman*, 112 S. Ct. 2649, 2664 (1992) (Blackmun, J., concurring) (school prayer); *id.* at 2676 (Souter, J., concurring).

Government speech or symbolic conduct violates the Establishment Clause if it endorses a position for or against religion in general or for or against one religion in particular. When government merely speaks, the communicative and symbolic impact is dominant with respect to both the constitutional costs and the alleged majoritarian benefits. Tangible consequences are secondary and attenuated or even absent altogether. When the government is engaged only in religious speech or symbolic religious conduct, the endorsement test goes to the heart of the matter. It is a way of explaining that when government deliberately takes positions on religious issues, coercion is superfluous.

At first the endorsement test also seemed to be a helpful way of reducing the ambiguities of the *Schempp-Lemon* formulation of neutrality: endorsement was a way of explaining that it is not a forbidden advancement of religion to exempt conscientious objectors or otherwise

remove burdens from religious practice. *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring). But the opinion below demonstrates that the endorsement test can aggravate those ambiguities rather than solve them.

This case demonstrates that it is both unnecessary and misleading to focus on symbolism when government action has more tangible consequences and is directed at more tangible problems. When government uses its coercive powers to tax or regulate, or when it gives money to religious entities, or where as here it confers on a religious community the power to tax, spend, and regulate, then the focus should be on the actual purpose and effect of what the government has done. If the tangible effects of the government's acts depart from neutrality, there is a prima facie violation of the Religion Clauses, and it adds nothing to speak of endorsement. Conversely, if the tangible effects of what the government has done come as close to neutrality as the circumstances permit, government has not endorsed religion, and it is a mistake to inquire separately whether it has done so by implication.

If a reasonable observer fully understands the government's program and realizes that it is neutral, then that observer will not perceive an endorsement, and the endorsement test will have added nothing to the analysis of tangible consequences. On the other hand, if the reasonable observer perceives an endorsement even though the government's program comes as close to neutrality as circumstances permit -- even though government has done everything possible to minimize its influence on religious choices -- then the reasonable observer is simply mistaken (or unreasonable after all), and constitutional analysis should not be held hostage to

his mistake. Put another way, the observer's perception of implicit endorsement in a neutral policy will always be a smaller departure from neutrality than the tangible incentives or disincentives of alternative policies.

Talk of a "symbolic union" of church and state is irrelevant and misleading for similar reasons. The problem in this case is not a symbolic union, but a real union. The law creating the Kiryas Joel Village School District is unconstitutional not because of what it symbolizes, but because of what it does: it actually confers governmental power on an entity defined by religion. Symbolism does not compound the violation; and if there were no violation, symbolism would not create one. The New York legislation in this case was an attempt to solve a difficult problem, and the legislature would have been criticized no matter what it did. It is enough for the legislature to enact the most neutral solution available, without having to worry whether its critics might perceive symbolism or implied endorsements.

This Court extended the endorsement test beyond government speech and symbolic conduct in *School District of Grand Rapids v. Ball*, 473 U.S. 373, 389-90 (1985). The Court found an implicit endorsement in state funded courses on the campus of religious schools. This extension of the endorsement test was unnecessary to the result, which was adequately explained by other rationales set out in the same opinion. Most important, there was nothing in the structure of the Grand Rapids program to keep it from expanding until it supplanted all or part of the core curriculum, thus enabling government to pay for the core educational functions of a religious school. *Id.* at 396-97. *See also id.* at 385-89 (fear of state-sponsored religious indoctrination). These other rationales rested on a long line of this Court's cases. Talk of implied

endorsement and symbolic union was dictum, transferring a new formulation from the government speech cases to a novel context.

Experience has shown that it was misleading to transfer this doctrine beyond its natural scope. It can be abandoned without calling *Grand Rapids* into question. Indeed, the Court rejected an argument based on a symbolic "link" in *Bowen v. Kendrick*, 487 U.S. 589, 613 (1988), on the ground that it reached much too far. Critics can find a symbolic link or union in any cooperation between church and state, even in the provision of services to disabled children. Fears of merely symbolic unions would thus call in question every one of the cases cited at page 12 of this brief; taken seriously, such arguments would require discrimination against religious citizens. All that remains is to acknowledge that *Bowen* ended the mistaken extension of the endorsement and symbolic-union tests to cases involving tangible government programs. These arguments should be reserved for government speech about religion.

CONCLUSION

For the reasons stated in parts I, II, III, and VI of the brief of the American Jewish Congress, the judgment should be affirmed. This judgment would not and should not preclude special education services to the disabled children of Kiryas Joel.

Affirmance need not entail reconsideration of either the *Schempp-Lemon* test or the endorsement test. But if those tests are to be reconsidered, only minor clarifications are needed. The essence of those tests is the constitutional commitment that government should be

neutral towards religion. That commitment must be preserved. But that commitment does not preclude removing burdens from religious minorities, and it does not require speculation about implicit endorsement in otherwise neutral government programs. Rather, the commitment to neutrality is best understood as minimizing the influence of government on private religious choices.

Respectfully submitted,

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BOARD OF EDUCATION OF THE
KIRYAS JOEL VILLAGE SCHOOL DISTRICT,

Petitioner,

v.

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

On Writ Of Certiorari
To The New York Court Of Appeals

**BRIEF AMICI CURIAE OF THE NEW YORK STATE
UNITED TEACHERS, AFT, AFL-CIO AND THE
AMERICAN FEDERATION OF TEACHERS,
AFL-CIO AS AMICI CURIAE IN SUPPORT
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INTEREST OF THE *AMICI CURIAE*

The New York State United Teachers (hereinafter "NYSUT") is a federation of over 800 local employee organizations which are organized and exist pursuant to the New York State Public Employee's Fair Employment Act (N.Y. *Civil Service Law* Article 14) (McKinney's 1983). NYSUT's statewide membership exceeds 330,000 public employees. The vast majority of NYSUT's membership is comprised of the professional teaching and support staff employed within the approximate seven hundred and fifty public school districts situated throughout New York.

The American Federation of Teachers, AFL-CIO (hereinafter "AFT") is a national labor union affiliated with the AFL-CIO and the parent organization of various state affiliates, including NYSUT. The AFT represents over 800,000 members who work in public elementary and secondary schools, community colleges and universities, state government and health care. The vast majority of AFT members work as teachers and teaching assistants in public elementary and secondary schools.

Pursuant to Rule 37 of the Rules of this Court, and the stipulation previously entered between petitioner and respondents, the respondents have consented to the submission of the present brief *amici curiae* by NYSUT and the AFT. Respondents' letter consenting to such filing has been simultaneously submitted with this brief.

SUMMARY OF ARGUMENT

Chapter 748 of the Laws of 1989 (McKinney's 1989 Session Laws of New York 1989, Vol. 2)¹ established a separate and independent union free school system for the Village

¹ Chapter 748 reads, in pertinent part, that:

Section 1. The territory of the village of Kiryas Joel in the town of Monroe, Orange County, on the date when this act shall take effect, shall and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and duties of the union free school under the

of Kiryas Joel, a religious enclave consisting exclusively of approximately 8,500 Hasidic Jews of the Satmar sect. *Grumet v. Board of Education*, (Pet.App. 3a),² 81 N.Y.2d 518, 601 N.Y.S.2d 61, 63 (1993). Given the facts, circumstances and litigation leading up to and resulting in the legislative passage of Chapter 748, *amici* urges the Court to conclude that the legislation violates the purpose, primary effects and excessive entanglement components of *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971); and, thus, contravenes the Establishment Clause of the First Amendment of the *Constitution*. Moreover, since Chapter 748 extends a religious-based denominational preference exclusively to the Satmar Hasidic community of Kiryas Joel, in the form of according to it its own public school system, that legislation must be viewed as being constitutionally suspect and thus subject to the strict scrutiny standard. See, *Larson v. Valente*, 456 U.S. 228, 247, 252 (1982). Since that legislation was drafted in an excessive and overly broad manner to fulfill a supposed compelling governmental interest to provide special education services, it likewise must be struck down as being in violation of the Establishment Clause of the U.S. Constitution.

In sum, upon application of either or both the *Lemon* test or the *Larson v. Valente* strict scrutiny standard, the Order and Judgment of the New York State Court of Appeals should be affirmed by this Court, and Chapter 748 of the Laws of 1989 must be declared unconstitutional.

provisions of the education law.

§ 2. Such district shall be under the control of a board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.

² “___ R. ___” refers to the printed three-volume record filed in the New York Court of Appeals. “J.A. ___” refers to the Joint Appendix. “Br.App. ___” refers to the Appendix to this brief; “Pet.App. ___” refers to the Appendix to the Petition for Writ of Certiorari filed by the Petitioner Board of Education of the Kiryas Joel Village School District; “R.Br.App. ___” refers to the Appendix to the Brief Submitted by Respondents in Opposition to the Petition for a Writ of Certiorari.

BACKGROUND AND STATEMENT OF FACTS

Indispensable to an understanding and treatment of the issues before this Court is a full examination into the tenets and practices of the Satmar Hasidic sect, the history of past litigation involving the Satmarer and the context out of which Chapter 748 of the Laws of 1989 became law.

A. The Village of Kiryas Joel, Its Genesis and Inhabitants.

The Village of Kiryas Joel, located in the Town of Monroe, Orange County is one of three communities within New York whose inhabitants are members of the Satmarer, an ultraorthodox Hasidic sect (2R. 406). In 1974 the Satmarer first began to inhabit an area within the Town of Monroe which was known as the Monwood subdivision (3R. 517). When the Monwood subdivision was purchased by the Satmar leadership, it was an approved subdivision, but an unimproved and unbuilt parcel of rural land (J.A. 10).

In 1976 the Satmarer petitioned the Town of Monroe to establish the 320+ acre Satmar-owned Monwood subdivision as an incorporated village (J.A. 10-14). This village was to be known as "Kiryas Joel"³ (3R. 517-525). The town supervisor described the timing of the incorporation petition as "almost sinister and surely an abuse of the right of self-incorporation" since it was initiated "during the pending of a vigorously litigated issue in which the Town ha[d] accused the Satmar community of serious and flagrant violations of its zoning laws" (J.A. 13-14). Nonetheless, the incorporation petition was granted, as a mandated ministerial act under existing law

³ The translation of "Kiryas Joel" is "Community of Joel." The Village's proposed (and eventual) name was in reference to grand Rebbeh Joel Teitelbaum, the founder and first religious leader of the Satmar (2R. 406, 408). Founding Reb Joel Teitelbaum served from 1904-1905 until his death in 1979, at which point he was succeeded by his nephew, Reb Moshe Teitelbaum (3R. 493). Rebbe Moshe Teitelbaum later appointed his eldest son, Reb Aaron Teitelbaum to the rabbi of the Village of Kiryas Joel (3R. 494). The Rebbeh continues to serve as the ultimate decisionmaker on all matters of concern to the Satmar community (3R. 493).

(J.A. 15). The Satmar community vote on the resultant incorporation proposition was, in February 1977, unanimously approved by the Village's residents, save for a single opposing vote (3R. 523).

The Village of Kiryas Joel has grown to become a religious enclave for approximately 8,500 Satmarer. (1R. 32) Neighbors within the Village of Kiryas Joel are "all of the same cultural, social and religious background . . . [and] there are no people living in the Village of Kiryas Joel other than Hasidic Jews" (*Weider* Record p. 70; Br.App. 7).⁴ The social and cultural components of the Satmarer Hasidism "are markedly different from the outside community." *Id.*; see also Br.App. 5-6; 18-19. As the New York Court of Appeals detailed in *Weider*, 72 N.Y.2d at 179-180, 531 N.Y.S.2d at 891:

Apart from separation from the outside community, separation of the sexes is observed within the village. Yiddish is the principal language of Kiryas Joel; television, radio and English language publications are not in general use. The dress and appearance of the Hasidim are distinctive – the boys, for example, wear long side curls, head coverings and special garments, and both males and females follow a prescribed dress code. Education is also different: Satmarer children generally do not attend public schools, but attend their own religiously affiliated schools within Kiryas Joel. Boys are enrolled in the United Talmudic Academy (UTA) and girls in Bais Rochel, a UTA affiliate. With an apparent over-all goal that children should continue to live by the religious standards of their parents, Satmarer want their school to serve primarily as a bastion against undesirable acculturation, as a training ground for Torah knowledge in the case of boys, and, in the case of girls, as a place to gather knowledge they will need as adult women.

⁴ See, page 70 of Record on Appeal in *Board of Education of Monroe-Woodbury Central School District v. Weider*, 72 N.Y.2d 174, 531 N.Y.S.2d 889 (1988) mod'ng 132 App.Div.2d 409, 522 N.Y.S.2d 878 (2nd Dept. 1987) excerpts of which have been included in the Appendix to this Brief (hereinafter "*Weider* Record") (see, Br.App. 1-32).

(Rubin, *Satmar: An Island in the City*, at 140 [Quadrangle 1972]) [Footnote omitted].

By founding, and existing within, a community exclusively of Satmarer, and by purposefully being isolated from outside society, the Satmar endeavor to promote and further their own religious beliefs, ideologies and culture. They strive to inculcate in their children the Satmar's ultraorthodox religious values and beliefs, and simultaneously avoid exposing them to acculturation (3R. 494-496). The "sociological way of life for the Satmar Hasidic is one of distained (sic) isolation from the rest of the Community" (J.A. 10). Part and parcel of the Satmar's isolationist attitude toward the evils and adverse influences of contemporary Western society, is its ongoing need to foster, within its community, a negative image of that "outside" world (*Weider Record*, p. 390 (citing Israel Rubin, *An Island in the City*, at 288 (1972)) [hereinafter Rubin]; Br.App. 11)

The insular separatist desires of the Satmar may not be seriously questioned:

Criticism of Satmar Hasidism is directly related to the insular attitudes of the group. Life in the Satmar ghetto is much as it was in Hungary in the beginning of the century. No compromise is made with the Western world . . . The Satmar Rebbe admonishes his followers to keep every letter of the Torah, fearing that even the small divergence will lead successive generations to still further transgressions and, ultimately, to the demise of Hasidim (3R. 464)

See also, *Parents Assn. of P.S. #16 v. Quinones, et al.*, 803 F.2d 1235, 1237 (2nd Cir. 1986) (hereinafter "*P.S. 16*"). ("In general, the [Satmar] Hasidic faith stresses a strict separation between the Hasidim and the rest of society.")

Thus, the entire existence of the Satmar community revolves around the learning and strict adherence to the teaching of both the Torah and the Rebbeh (2R. 407; 2R. 454; 3R. 492-493).⁵ "Religion and its preservation in the form interpreted and practiced in Satmar,

⁵ For an historical overview of the Satmarer Hasidim, see 2R. 405-406; 2R. 428-469; 3R. 491-497.

occupies a central place in virtually all matters of importance" (3R. 492). Religious indoctrination and adherence to religion is "at the root of the Satmar Hasidim's effort to preserve their culture" (*Weider Record*, p. 298 (citing Rubin, *supra* at 45); Br.App. 12). The survival and continued existence of Satmar is viewed as being largely dependent upon the success of its schools. (*Weider Record* p. 345 (citing Rubin, *supra* at 139); Br.App. 12).

The students residing in the Kiryas Joel community attend the United Talmudic Academy (hereinafter "UTA") of Kiryas Joel, which includes Bais Rochel, the girl's component. The UTA had an enrollment in excess of 3,000 pupils in 1986 (*Weider Record* p. 112; Br.App. 3).⁶ The learning of the Torah and adhering to the teachings of the Rebbe is the central purpose of the private educational system to which the vast majority of Satmar children enroll within the Village of Kiryas Joel. Minimal emphasis is placed upon the value of education as a vehicle for success in the outside capitalistic society away from the Satmar community. As one reknown expert (Israel Rubin; 3R. 491-492) on Satmar Hasidism has noted:

Secular education beyond a rudimentary knowledge of the "three R's" is limited to occasional technical training, preferably outside the walls of higher learning. Colleges and universities are mysterious unknown territory and are thought to offer, along with some useful technical knowledge, instruction in heresy in an environment free of all moral restraints.

(*Weider Record*, p. 369 (citing Rubin, *supra* at 186); Br.App. 14; *see also* Br.App. 19-20).

The Satmarer's insistence upon the adherence to their ultraorthodox religious beliefs and separatist practices within the public educational setting have, in recent years, been the center of multiple lawsuits, one which eventually and directly led to the passage of Chapter 748.

⁶ Boys and girls are segregated at the UTA and do not mix culturally or socially outside the home. Even within the home, any boy-girl relationship is limited. (*Weider Record* p. 69; Br.App. 6; *see also* Br.App. 18)

B. Past Litigation

1. *Parents Assn. of P.S. 16 v. Quinones et al.*, *supra*, stemmed from an effort to provide, in a manner consistent with the Establishment Clause, remedial education to the Satmar Hasidic Jewish elementary female students attending Beth Rachel Satmar Hasidic School. The New York City Board of Education devised a plan to conduct the remedial classes on the premises of Public School 16. However, in deference to the societal separatist tenets followed by the Satmar and in order to induce the Beth Rachel school administrators to send their students to P.S. 16, the New York City Board of Education established a plan which called for the offering of instruction in classes which were closed off from the rest of the public school building. The Beth Rachel students were simultaneously given assurances that their remedial classes would be conducted separately from any classes offered to the balance of P.S. 16 school's population, which was composed primarily of Hispanic students. *Id.* at 1237.

In striking down the New York City Board of Education's plan, the United States Court of Appeals for the Second Circuit cited the following quotations from the parties' submission with regard to the separatist component of the Satmar, as such was reportedly expressed by some of its followers:

We struggle very hard to maintain our belief and our culture . . . We want our children separate.

* * *

It's not that these Hispanic people are bad, it's that they're different . . . They are not a good influence on our girls.

* * *

If we have our kids learning with them [the Hispanics], they'll be corrupted . . . We don't hate these people, but we don't like them. We want to be separate. It's intentional. *Id.* at 1238.

Reversing the district court, the court granted plaintiff's motion for a preliminary injunction enjoining implementation

of the plan concluding that the plan had the primary effect of advancing the separatist beliefs of the Satmars in contravention of the Establishment Clause of the First Amendment. *Id.* at 1240-1242. In so doing, the court held that:

In keeping with their general separatist beliefs, the Hasidim have expressed a desire to keep their children separate. . . . The lengths to which the City has gone to cater to these religious views, which are inherently divisive, are plainly likely to be perceived, by the Hasidim and others, as governmental support for the separatist tenets of the Hasidic faith. *Id.* at 1241.

2. In *Bollenbach v. Board of Education of the Monroe-Woodbury Central School District*, 659 F.Supp. 1450 (S.D.N.Y. 1987), the plaintiffs (female bus drivers of the Monroe-Woodbury School District) alleged that the Monroe-Woodbury Central School District (a defendant-petitioner in the instant action) violated the Establishment Clause of the First Amendment by accommodating the religious beliefs of the United Talmudic Academy ("UTA") of the Village of Kiryas Joel when it removed female bus drivers from the transportation runs carrying male Hasidic students to the UTA. The District Court held that the Monroe-Woodbury's deployment of only male bus drivers violated the Establishment Clause since that accommodation had the primary effect of advancing the religious beliefs of the Satmars which severely restricted any interaction between the members of the opposite sex.

3. In *Board of Education of the Monroe-Woodbury Central School District v. Weider, etc. et al., supra* ("Weider"), defendant-petitioner herein, the Monroe-Woodbury School District, brought suit seeking a judgment declaring that, under *Education Law* § 3602-c(9) (McKinney's 1981), it could not legally provide special education and related services to the handicapped students residing in the Village of Kiryas Joel at any location other than within the Monroe-Woodbury School District's own public school buildings. At all times prior to and during the *Weider* lawsuit, the Monroe-Woodbury School District was (in its own words) "ready and willing to provide special education and related services to the

[defendant children]" (*Weider* Record p. 174; Br.App. 25; see also 3R. 509-510; *Weider*, 72 N.Y.2d at 181, 531 N.Y.S.2d at 892). The venue of those services was, however, a matter in dispute, with the Satmar asserting that those special education services must be provided apart from the regular public school classrooms of the Monroe-Woodbury School District.⁷ The defendants in that lawsuit (who were the parents of the involved students) asserted that the special education needs of their children should be provided by the Monroe-Woodbury School District on the premises of the Satmar Hasidic school which their children attended for their regular instruction i.e., either the UTA or Bais Rochel. The parents maintained that the delivery of these special education services at the site of the student's private school was essential because of *inter alia*, "[T]he panic, fear and trauma [the students] suffered in leaving their own communities and being with people whose ways were so different from theirs." 72 N.Y.2d at 181, 531 N.Y.S.2d at 892.⁸ It was also argued by the defendant-parents that for the Monroe-Woodbury School District not to provide the special services at their religious schools, or at a neutral site, violated and interfered with their religious beliefs. *Id.* at 188, 531 N.Y.S.2d at 897.

The New York Court of Appeals held in *Weider* that *Education Law* § 3602-c(9) (McKinney 1981) did not require the Monroe-Woodbury School District to provide special education services to defendants' children within the Monroe-Woodbury School District's regular classes and programs.

⁷ From 1983-1986, various forms of special education services were provided by the Monroe-Woodbury School District to a broad range of Satmar Hasidic pupils who were enrolled in and who were educated in the Monroe-Woodbury's public schools. Noticeable improvement and progress was observed in the advancement of those pupils while enrolled in the public schools (*Weider* Record, pp. 174-178; Br.App. 25-28).

⁸ The genesis for the alleged existence of any so-called psychological reactions was later described by the Court of Appeals Judge Stewart Hancock, Jr. in his concurring opinion in the court below as not being prompted "by anything other than the well-meaning desire to comply with the religious requirement of keeping the Satmarer children separate from other children, concededly the cause of whatever emotional or psychological effect the children may have suffered" (Pet.App. 33a-34a).

However, the Court further held that, although the Monroe-Woodbury School District was not under a statutory restriction which limited its rendition of special education services to its own school buildings, it did not follow that the children were entitled to receive instruction within their own religious schools or even at a neutral site within the Village of Kiryas Joel. In this respect, the Court of Appeals stressed that, "defendants' statutory entitlement to special services does not carry with it a constitutional right to dictate where they must be offered." *Id.* at 188, 531 N.Y.S.2d at 889.

Instead of making reapplication with the Monroe-Woodbury School District to receive the special education services in the manner prescribed by the court in *Weider*,⁹ the Satmar directed their efforts toward a political/legislative resolution of the controversy. Thus, in the wake of the Court of Appeals' July 1988 *Weider* decision, and as a result of the Satmar's political efforts, Chapter 748 of the Laws of 1989 was enacted into law.

C. Chapter 748 of the Laws of 1989

Assembly Bill number 8747 was signed into law by the Governor of New York on July 24, 1989, becoming Chapter 748 of the Laws of 1989 (1R. 90; fn. #1, *supra*). While the bill was before the Governor awaiting his approval or disapproval, the New York State Education Department, along with a number of organizations and entities, urged the Governor to veto the bill for, *inter alia*, the reasons that it violates the required constitutional separation of church and state and the equal protection provisions of the *Constitution* (1R. 99-109).

However, in urging approval of the legislation, New York Assembly sponsor Joseph Lentol, in his July 7, 1989 memorandum to the Governor, explained the purpose of the bill to be as follows:

I write regarding Assembly Bill 8747 which establishes a new union free school district in Orange County. This legislation ends years of legal battles

⁹ See fn. #16, *infra* at page 29.

between the Monroe-Woodbury School District and the residents of the village of Kiryas Joel over how to provide state funded special education programs to the Hasidic children of the county.

The hasidic jewish community hold firmly to its religious tenets. With the enactment of this legislation, bureaucratic entanglements that have prevented the delivery of special education programs to the hasidic kids of the village of Kiryas Joel will end. (J.A. 19)

See also, Assembly member Silver's memorandum in support to the Governor (J.A. 38-39).

Rejecting the constitutional arguments advanced by those opposing the legislation, the Governor signed Assembly Bill 8747 into law (J.A. 40-41).

Chapter 748, thus, established, commencing July 1, 1990, a new and separate union free school district, to be known as the Kiryas Joel Village School District, which was carved out from the existing Monroe-Woodbury Central School District, and which was to be coterminous with the geographical boundaries of the Village of Kiryas Joel (1R. 90-91). Preparatory to the formal opening of that school district on July 1, 1990, certain essential organizational steps were undertaken, including the nominating and electing of the first Board of Education for the Kiryas Joel Village School District. The immense control and power possessed and exercised by the supreme religious leader of the Village of Kiryas Joel became immediately apparent throughout this process.

In the spring of 1990, during the nomination and election process for the inaugural school board, a controversy promptly erupted within the Kiryas Joel community because of the decision made by one of its residents (Joseph Wallman) to run for a seat on the seven member Kiryas Joel board of education. Seven candidates had already received the public endorsement of the Satmar Rebbe Moshe Teitelbaum. Because of his decision to run unendorsed, candidate Wallman was not only publicly denounced by the Grand Rebbe, but he became the recipient of considerable harassment within the Satmar community, and was formally expelled from the Congregation

Yetev Lev D'Satmar. This punishment led to the expulsion of his children from that congregation's yeshivas. See, *Wallman v. United Talmudical Academy, etc.*, 147 Misc.2d 529, 558 N.Y.S.2d 781 (Sup.Ct. Orange County 1990) ("*Wallman*")¹⁰ which culminated in a decision holding Rov Aaron Teitelbaum, the town's rabbi and the son of the current Grand Rebbe, in contempt of court. *Wallman* at 533, 558 N.Y.S.2d at 783-784.

All seven of the candidates receiving the endorsement of the Grand Rebbe were elected to seats on the first board of education of the Kiryas Joel Village School District. (4R. 487-488).¹¹

From the opening of Kiryas Joel Village School District in July of 1990 to the time the underlying summary judgment motions were filed, the district enrolled thirteen handicapped resident pupils from the Village of Kiryas Joel, and contracted with two nearby school districts (the East Ramapo and Monroe-Woodbury school districts) to receive an additional 20 of their Satmar children with handicapping conditions (3R. 512; 715 3R. 504). Based upon census data compiled and maintained by the New York State Education Department, the student enrollment figures for each of those school years were as follows: 1991-92 – 10.9 full time resident students (Resp.App. 9), 29 non-resident students (Resp.App. 9) with 10 students enrolled part-time; 1992-93 – 13 full time resident students (Resp.App. 3, 9), 29 non-resident students (Resp.App. 9) and an average of 95.14 parochial students who receive supplementary special education services under the dual enrollment provisions of New York State Education Law § 3602-c (McKinney 1983) (*Id.* at 9-10). The vast majority of these dual enrolled students (i.e. 83.638) received one (1)

¹⁰ Excerpts of the record of that proceeding may be found in the Record at 1R. 82-86; 3R. 590-631; 2R. 470-480; 483-490.

¹¹ Among those nominated and elected to the Kiryas Joel Village School board was Abraham Weider (Resp.App. 7) who was a defendant in *Board of Education v. Weider, supra*; the president of the community's major congregation (the Yetev Lev D'Satmar) and a representative of the Grand Rebbe (1R. 480; 487-490).

period of special education service per day (Resp.App. 9). For its first year of operations (1990-91), the Kiryas Joel Village School District was allocated \$98,350 in state funds (3R. 762). The state aid receipts for the succeeding school years were as follows: 1991-92 \$433,383 (projected) (3R. 762); 1992-93 \$496,741 (Br.App. 33-35).

D. Decision of the Courts Below

In affirming the order and judgment of the Supreme Court, Appellate Division (187 A.D.2d 16, 592 N.Y.S.2d 123; Pet.App. 61a-91a), the New York State Court of Appeals concluded that Chapter 748 was facially unconstitutional as being in contravention of the Establishment Clause of the First Amendment of the Federal *Constitution* (Pet.App. 16a-17a) (81 N.Y.2d 518, 601 N.Y.S.2d 61).

The court based that determination on the conclusion that the "second prong of *Lemon* [*v. Kurtzman*, 403 U.S. 602] had been clearly violated" since the principal or primary effect of chapter 748 was to advance religious belief¹² (Pet.App. 10a). The court concluded that:

[T]h[e] symbolic union of church and State effected by the establishment of the Kiryas Joel Village School District under chapter 748 of the Laws of 1989 is sufficiently likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval, of their individual religious choices. (Pet.App. 12a)

For the reasons expressed by the court below, and for all of the additional reasons which are to be set forth in the remainder of this brief we urge the Court to affirm the lower court's determination.

¹² The court's majority chose not to address whether the first ("purpose") or the third ("excessive entanglement") components of *Lemon* were also violated (Pet.App. 16a). Judge Hancock, Jr. held, in a separate concurring opinion, that both the "primary effects" and "purpose" elements of *Lemon* were violated (Pet.App. 30a).

ARGUMENT

I. CHAPTER 748 OF THE LAWS OF 1989 VIOLATES THE CONSTITUTIONAL PROSCRIPTION AGAINST THE ESTABLISHMENT OF RELIGION.

The analytical framework for determining whether Chapter 748 of the Laws of 1989 comports with the Establishment Clause of the First Amendment is the three-part test pronounced in *Lemon, supra*.¹³ Since 1971 *Lemon* has been the guiding standard in determining the presence or absence of an Establishment Clause violation. See, e.g. *Lamb's Chapel v. Center Moriches Sch. Dist.*, ___ U.S. ___, 124 L.Ed.2d 352, 363 (1993); see also *Lee v. Weisman*, ___ U.S. ___, 120 L.Ed.2d 467, 490-491 n.4 (1992) (Blackmun, J., concurring) ("Since 1971, the Court has decided 31 Establishment Clause cases. In only one instance, the decision in *Marsh v. Chambers*, 463 U.S. 783, 77 L.Ed.2d 1019, 103 S. Ct. 3330 (1983), has the Court not rested its decision on the basic principles described in *Lemon*"). The well-settled criteria of *Lemon* ought to be applied by the Court to this appeal, as was done by all three of the lower courts (Pet.App. 1a-60a; 61a-91a; 92a-101a). In addition to the requirements of *Lemon*, the most fundamental and basic precept central to the meaning of the Establishment Clause must be reemphasized.

It has often been held that the establishment proscription of the First Amendment forbids not only the formulation of a state religion, but requires that government, at all times, remain *neutral* with respect to all religion. In *Lee v. Weisman, supra*, ___, 120 L.Ed.2d at 482-483, this Court noted that "[t]he central meaning of the Religion Clause of the First Amendment . . . is that all creeds must be tolerated and none

¹³ To pass constitutional muster under the Establishment Clause: First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, * * * ; finally, the statute must not foster 'an excessive government entanglement with religion' [citation omitted], *Lemon, supra* at 612-613.

avored." "[S]ubtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses" are all forbidden under the Establishment Clause. *Gillette v. U.S.*, 401 U.S. 437, 452 (1971). In *School Dist. of Abington Township, Pennsylvania, et al. v. Schempp*, 374 U.S. 203, 222, (1963) the Court held:

The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.

A careful examination of the record of this appeal, and, in particular, the facts and circumstances preceding and surrounding the enactment of Chapter 748 will, it is submitted, compel the conclusion that Chapter 748, not only fails to pass the three-part *Lemon* test, but violates the more fundamental Establishment Clause requirement of governmental religious neutrality.

A. The Legislative Purpose of Chapter 748 Was To Further The Mission Of The Satmar Hasidic Sect By Creating An Independent School System For The Religious Enclave Of The Village Of Kiryas Joel

The purpose prong of the *Lemon* test:

[I]s not satisfied . . . by the mere existence of some secular purpose, however, denominated by religious purposes [cite omit.]. If a principal purpose is to further statute is void.

That any secular purpose is insufficient under *Lemon* is clear from the fact that every statute can be described in such a way that it includes a secular purpose.

Cammack v. Waihee, 944 F.2d 466, 469 (9th Cir. 1991) (Reinhardt, J. dissenting on denial of rehearing *en banc*); see also, *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J.,

dissenting) ("The purpose prong means little if it only requires the Legislature to express any secular purpose and omit all sectarian references, because legislators might do just that").

Thus, in considering the first element of the *Lemon* test in the present case (i.e. that the legislation must have a secular purpose), the Court must look beyond any claim that the purpose of Chapter 748 was merely to provide the necessary authorization to educate students in need of special education services residing within the Village of Kiryas Joel. Any assertion to that effect totally fails to satisfy the purpose prong of *Lemon* for indeed **those special services were, at all times, made available to the students through the Monroe-Woodbury School District**. See Pet.App. 15a, 63a-64a and 69a; see, also, discussion of *Weider* at pp. 8-10, *supra*. However, it is clear from the record that the manner and form of the delivery of those special services by the Monroe-Woodbury School District were incompatible with the religious tenets and ideologies governing the Satmars. Because of this lack of compatibility with their ultraorthodox religious beliefs, and the unwillingness of the Monroe-Woodbury School District to accede to the demands of the Satmars, Chapter 748 was, in fact, proposed and eventually enacted into law. That Chapter 748's true purpose was to succumb to the religious tenets and wishes of the Satmar community of Kiryas Joel is clear from the history of its enactment. The purpose, as expressed by the Assembly sponsor of Chapter 748 in his legislative memorandum to Governor Cuomo while that bill was awaiting approval was clear. See, *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987) (upon determining legislative purpose of law by reference to purpose expressed by statute's legislative sponsor, statute was struck down, as facially invalid, as being an advancement of religion in violation of the Establishment Clause); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 124 L.Ed.2d 472, 495 (1993) (nullifying city ordinance upon considering objective events and factors leading to ordinance's enactment, including its legislative history, and contemporaneous statements made by decisionmakers); *Wallace v. Jaffree*, 472 U.S.

38, 108 (1985) (Rehnquist, J., dissenting) ("[T]he constitutionality of a statute may depend upon what the legislators put into the legislative history and, more importantly, what they leave out").

The Assembly sponsor of Bill 8747, Assemblyman Joseph R. Lentol, stated to the Governor, in his July 7, 1989 memorandum urging executive approval, that the purpose of the bill:

[E]nds years of legal battles between the Monroe-Woodbury School District and the residents of the Village of Kiryas Joel over how to provide state funded special education programs to the Hasidic children of the county.

The hasidic jewish community holds firmly to its religious tenentes. With the enactment of this legislation, bureaucratic entanglements that have prevented the delivery of special education programs to the hasidic kids of the village of Kiryas Joel will end. [Emphasis added] (J.A. 19)

Assemblyman Sheldon Silver similarly stated in his July 24, 1989 letter to the Governor, that:

The bill represents a legislative response to [the Court of Appeals' *Weider* decision] by providing a mechanism through which students **will not have to sacrifice their religion traditions** in order to receive the services which are available to handicapped students throughout the State. [Emphasis supplied] (J.A. 38-39)

The New York State Division of the Budget likewise advised the Governor, in its memorandum recommending disapproval of the bill that the:

[T]he Hasidic residents of Kiryas Joel have expressed a number of significant concerns to the Monroe-Woodbury School District regarding the transportation and education of their handicapped pupil population. These concerns are primarily attributable to the religious precepts of the Hasidic sect prohibiting the intermingling of male and female children in such setting.

* * *

The bill provides a vehicle for resolution of the current conflict between the Monroe-Woodbury school district and the residents of Kiryas Joel through the establishment of the subject school district, with its own tax base and State-aid entitlements. (J.A. 32)

In signing Assembly Bill 8747 in law, the Governor acknowledged that the "bill is a practical solution to . . . an intractable problem" and is an "effort to resolve a long-standing conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, whose population are all members of the same religious sect" (J.A. 40-41). The Governor noted that there are approximately 100 handicapped students who are "not receiving special education services they need" since the Court of Appeals held in *Weider* that the Monroe-Woodbury School district "could not be compelled to provide special education services at a neutral site." *Id.* Concluding, the Governor noted that, "[T]his bill is a good faith effort to solve this unique problem." *Id.*

It is readily apparent from the overall legislative history of Chapter 748, that it was enacted to accommodate the religious objections made by the Satmarer to having their children taught in, and exposed to, a school environment apart from their own. It was **only** due to the existence of, and Satmar's strict adherence to the separatist ideology and religious doctrine, that these objections existed. The Supreme Court, Appellate Division, as well as the trial court so concluded. (Pet.App. 66a-67a; 99a-100a).

Chapter 748 had no "clear secular purpose", which was "sincere and not a sham". *Edward v. Aguillard*, 482 U.S. at 585, 586-587. Due to the absence of a true secular purpose, Chapter 748 violates the Establishment Clause. *Lemon, supra*.

Moreover, to enact legislation in direct response to these religious based objections, and thereby create a school system which is totally isolated from the secular world, constitutes the **ultimate** governmental act of promoting the Satmar religion in direct contravention of the second ("primary effects") prong of the *Lemon* test.

B. Chapter 748 Has The Primary Effect Of Advancing The Religious Doctrine Of The Satmar Hasidim.

Finding that Chapter 748 failed to meet the "effects" test of the *Lemon* decision, the New York Court of Appeals held that:

We conclude that this symbolic union of church and State effected by the establishment of the Kiryas Joel Village School District under chapter 748 of the Laws of 1989 is sufficiently likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval of their individual religious choices. Thus, the principal or primary effect of chapter 748 of the Laws of 1989 is to advance religious beliefs (Pet.App. 12a).

This finding of the court below is firmly based in the record.

Under the "effects" test of *Lemon*, the primary focus is whether the governmental action at issue communicates a message of governmental endorsement or disapproval of religion. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). Under the Establishment Clause, government is not only forbidden from creating a state religion, but is obligated to remain **neutral** with respect to all religion. *P.S. #16, supra* at 1240 (citing *School Dist. of Abington Township, Pennsylvania, et al. v. Schempp*, 374 U.S. 203, 215-216 (1963)):

The rationale behind the requirement of neutrality is, in part, that governmental actions giving even the appearance of favoring one religion over another are likely to cause divisiveness and disrespect for government by those who hold contrary beliefs. . . .

See also, *Lee v. Weissman*, ___ U.S. at ___, 120 L.Ed.2d at 488 (Blackmun, J., concurring).

Even a symbolic union of government and religion in an apparent sectarian enterprise is an impermissible effect under the Establishment Clause. *Grand Rapids School District v.*

Ball, 473 U.S. 373, 391 (1985) (declaring unconstitutional state programs financing the offering of public education classes by public school teachers which were held on non-public school premises leased to public schools); see also, *County of Allegheny v. ACLU*, 492 U.S. 573, 593-594 (1989) ("Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on question of religious belief . . .").

Given the history of both the difficulties and litigation between the Satmars and the public education community, all of which directly emanated from the religious precepts of the Satmarer, the act of government in granting to the Satmars their own public school system geographically coextensive with their religious community clearly and undeniably gives the message to the general public, as well as to the Satmar community, that government is supportive of, and endorses Satmar religious tenets. This result runs directly afoul of settled precedent barring any form of governmental endorsement of any religions. As the Court of Appeals for the Second Circuit in *P.S. 16*, 803 F.2d at 1241, observed in declaring unconstitutional the plan which segregated the Hasidic student population from the rest of the student body:

[T]he City's Plan seems plainly to create a symbolic link between the state and the Hasidic sect . . . The lengths to which the City has gone to cater to [the general separatist] religious views, which are inherently divisive, are plainly likely to be perceived, by the Hasidim and others, as governmental support for the separatist religious tenets of the Hasidic faith.

There can be no doubt that the creation by the State of New York of an entirely new public school district exclusively for the Hasidim, for the identical reason, can not avoid being perceived any differently.

As was succinctly expressed by the New York Court of Appeals:

Because special services are already available to the handicapped children of Kiryas Joel, the primary

effect of chapter 748 is not to provide those services, but to yield to the demands of a religious community whose separatist tenets create a tension between the needs of its handicapped children and the need to adhere to certain religious practices. Regardless of any beneficent purpose behind the legislation, the primary effect of such an extensive effort to accommodate the desire to insulate the Satmarer Hasidic students inescapably conveys a message of governmental endorsement of religion. Thus a 'core purpose of the Establishment Clause is violated' (see, *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 389, *supra*) (Pet.App. 15a)

In sum, Chapter 748 fails to meet the second element of the *Lemon* test since its primary effect is to advance religion.

C. Assuming Arguendo That Chapter 748 Was Susceptible To Effective Monitoring, That Monitoring Would Necessarily Entail Excessive Entanglement Between Government And Religion.

The third and final test which must be met under *Lemon* is that "the statute must not foster 'an excessive government entanglement with religion' [cite omit]". *Lemon, supra* at 613. Chapter 748 of the Laws of 1989 fails to fulfill this criteria.¹⁴

In *Lemon*, this Court was faced with a challenge directed at two state statutes which authorized the use of public funds to subsidize the salaries of teachers teaching secular subjects in non-public school. Since the majority of the recipient teachers taught in parochial schools, and since, under the enabling statute, each teacher had to fulfill set conditions which were promulgated to avoid any form of religious instruction or inculcation, the Court, in striking down the legislation, held that the statute fostered an excessive entanglement. The Court stated that:

¹⁴ The New York Court of Appeals chose not to address the "excessive governmental entanglement" issue, since it found the statute to have violated the second component of *Lemon* (Pet.App. 16a).

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that . . . [the statute's] restrictions are obeyed and the First Amendment otherwise respected. **Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment.** These prophylactic contacts will involve excessive and enduring entanglement between state and church. *Supra* at 620 [Emphasis added].

As this Court similarly held in invalidating the second statute involved in *Lemon* at 620-621:

[T]he very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state.

The same degree of impermissible church-state entanglement exists in the instant case.¹⁵

During the legislative process, the Division of the Budget advised the Governor that, if the then pending bill was enacted into law, it would present serious entanglement problems. The Division of the Budget warned as follows:

Although the Kiryas Joel School Board will be legally bound to operate its programs in accordance with Education Law and Commissioner's Regulations, this unique arrangement will no doubt present the State Education Department with **an extraordinary complex task to monitor/ audit the operations of this school district to ensure compliance with law. The special circumstances under which**

¹⁵ Given the peculiar circumstances preceding and surrounding the passage of the legislation at issue (not to mention the controversy which erupted when Joseph Wallman, a Rebbe-unendorsed school board candidate, chose to run for a seat on the first school board elections following passage of Chapter 748), it is highly doubtful that *any* form of effective monitoring of the Kiryas Joel Village School District (perhaps short of daily full-time placement of monitoring officials within the classrooms) exists which would be adequate to assure that religion and religious influences remain out of the school building.

this school district has been created may also invite constitutional challenges regarding the possibility of excessive government entanglement with religion. (J.A. 35) [Emphasis added]

Being obviously aware of the potential constitutional problems which might emanate from his signing of the bill into law, the Governor himself issued the following admonition:

Of course this new school district must take pains to avoid conduct that violates the separation of church and state because then a constitutional problem would arise in the application of this law. (J.A. 41)

Contrary to the strong advice and words of caution extended by the Governor, the religious hierarchy within the Village of Kiryas Joel has, in fact, directly intermeddled in the affairs of the school district by first selecting and publicly endorsing the nomination of seven members of the initial school board and then, most significantly, by taking acts of retribution against an eighth candidate (Joseph Wallman). See, 2R. 483-490; 3R. 590-641; *Wallman v. United Talmudical Academy*, 147 M.2d 529, 558 N.Y.S.2d 781 (1990).

In addition, the serious monitoring difficulties which were foreseen by the Division of the Budget have since become a reality. The Education Department officials who are responsible for monitoring Kiryas Joel's public school operations have "confirmed that [it] is an insular, segregated educational setting in which both the religion and culture of the Satmarer are inextricably bound" (3R. 511). It has also been reported that during a site visit to the school, Education Department officials observed displayed in the classroom, photographs of students lighting, in the company of their public school teacher, the candles of a menorah. *Id.*

It would be unrealistic to believe that a school system: (a) which came into existence (along with the Village itself) in direct response to the strong religious ultraorthodox beliefs of the Satmarer; (b) which is wholly situated in an insular religious community occupied exclusively by the Satmar Hasidim, who expect their religious beliefs and life-style to

be respected by all who come in contact with their community (3R. 514-517); (c) which exists in a community whose civic leaders are closely allied with and subordinates of the Grande Rebbe, or his son, the Rov; and (d) whose first school board is comprised of Satmar, all of whom were selected by the Grand Rebbe, would not be substantially affected, directly or indirectly, subtly or otherwise, by the ultraorthodox precepts and ideologies of the Satmarer. Indeed the type of retribution, punishment and harassment which school board candidate Joseph Wallman received, **even while the instant litigation was pending**, clearly demonstrates the pervasiveness of, and priority accorded to the adherence to religious doctrine within the Kiryas Joel community. The Kiryas Joel school system can not avoid being directly affected by those same forces (has already occurred), notwithstanding any alleged "good faith" efforts which may be undertaken by the school administration or the school teachers employed by the Board of Education of the Kiryas Joel Village School District.

As was stated in *Grand Rapids Sch. Dist. v. Ball*, *supra* at 387-388:

The danger arises 'not because the public employee [is] likely deliberately to subvert his task to the service of religion, **but rather because the pressures of the environment might alter his behavior from its normal course.**' *Wolman v. Walter*, 433 U.S. 229, 247, 53 L.Ed.2d 714, 97 S. Ct. 2593, 5 Ohio Ops. 3rd 197 (1977). . . . [The public school] teachers [serving] in such a [non-secular] atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach . . . (Emphasis supplied).

The religious environment which is the center of the Kiryas Joel community would likewise make it hard for the most dedicated educator "[w]ith the best of intentions, . . . to make a total separation between secular teaching and religious doctrine . . .". *Lemon* at 618-619; cf. *Meek v. Pittenger*, 421 U.S. 349, 369-370 (1975). At minimum, the "potential for impermissible fostering of religion is present". *Lemon, supra* at 619.

As new employees of the Kiryas Joel Village School District, all of its professional staff personnel occupy probationary positions and, thus, have tenuous holds on their employment. See, *Education Law* § 3012 sub. 1(a) (McKinney 1981) (Supp. 1993) (fixing, in most instances, a probationary period for all newly hired teachers of three years in duration). Given this reality, and given further the fact that under the *Education Law* the ultimate authority resides within the Board of Education (which is exclusively comprised of Satmars chosen by the Rebbe), when it comes to terminating the services of any probationary employee or granting them tenure, (*Education Law* § 3012 subd. 1(a), 2) (McKinney 1981) (Supp. 1993) the wishes, be they expressed or implied, proper or improper, of those school authorities will no doubt be respected. As was aptly expressed by the New York Court of Appeals, albeit in a different context, in *Baer v. Nyquist*, 34 N.Y.2d 291, 299, 357 N.Y.S.2d 442, 448 (1974):

It is not wise . . . in dealing with a personnel system to have too much confidence in the "choices" made by a school teacher **who must seek and receive accommodation from his superiors.** (Emphasis supplied).

It was unquestionably due to all events, including the series of lawsuits, leading up to the proposed legislation that the Division of the budget forewarned the Governor of the "extraordinary complex task" facing the State Education Department to closely monitor the Kiryas Joel Village School District to assure its compliance with the law (J.A. 35). The controversy surrounding the first school board election and observations personally made by Education Department officials of the occurrence of obvious constitutionally impermissible religious activity within the classroom solidifies the prediction voiced by the Division of the Budget and plainly demonstrates the absolute need for continuous and comprehensive monitoring of the Kiryas Joel's public school district's daily operations to insure that a strict non-ideological environment exists. However, as the Court concluded in *Meek*

v. Pittenger, 421 U.S. 349, 370 (1975) (declaring unconstitutional a program pursuant to which public school teachers provided auxiliary secular services to parochial students):

[P]rophylactic contacts devised [under the challenged statute] to insure that the teacher played a strictly non-ideological role **would necessarily give rise to an intolerable degree of entanglement between church and state.** (Emphasis supplied).

See also, *Grand Rapids School District v. Ball*, *supra* at 386.

The same, if not a greater degree of governmental entanglement would, of necessity, result here in order to effectively determine and assure that the pervasive religious influences which exist within, and are inextricably connected with, the Kiryas Joel community do not creep into the public school classrooms. As a consequence, Chapter 748 fails to meet the third element of the *Lemon* test since it results in excessive entanglement between government and religion.

D. Petitioner Board of Education's Argument that Chapter 748 is a Valid Accommodation of the Satmar Religion is Fatally Flawed.

In its brief, petitioner Board of Education argues that Chapter 748 merely remedied the pre-existing state-imposed "deterrent" to the free exercise of religion which has resulted in the residents of the Village of Kiryas Joel forbearance of special education services; that Chapter 748 was necessary and is constitutionally appropriate to accommodate "the needs of a community of devoutly religious people" and to "ameliorate a burden that result[ed] from the free exercise of religion" (Petitioner Board of Education's Brief, p. 40-43).

It is of note that the same accommodation argument which petitioner advances was asserted in *P.S. #16*, *supra* and soundly rejected by the Court of Appeals for the Second Circuit. In dismissing that claim, the Court of Appeals held that:

The Free Exercise Clause of the First Amendment ('Congress shall make no law . . . prohibiting the free exercise [of religion]') does not prohibit a government from forcing a choice between receipt of a public benefit and pursuit of a religious belief of if it can show a

compelling reason for doing so. *See Bowen v. Roy*, 476 U.S. 693, 106 S. Ct. 2147, 1256, 90 L.Ed.2d 735 (1986). Avoiding a violation of the Establishment Clause that would otherwise result from an apparent endorsement of the tenets of a particular faith is ample reason for compelling that choice. *Supra* at 1241-1242.

In addressing petitioner's "accommodation" claim, *amici* concede that under the protection of the Free Exercise Clause, the Satmar should be allowed to fully follow the precepts and practices of their religion within their synagogues, within their homes and their religious schools. However, the Free Exercise Clause does not permit the Satmar to insist, through reliance upon that Clause, that its religious practices and principles take precedence over the mandate of the Establishment Clause of barring direct or indirect governmental sponsorship of religion, or any religious or cultural-based religious tenet or practice. Case law accords clear priority to the Establishment Clause.

As this Court stated in *Lee v. Weisman*, *supra*, 120 L.Ed.2d at 480:

The principle that government may accommodate the free exercise of religion **does not supercede the fundamental limitation imposed by the Establishment Clause**. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not **coerce anyone to support** or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or **tends to do so**. [Emphasis added]

The net effect of Chapter 748 has been to sanction *inter alia* the religious separatist dogma of the Satmarer. The petitioner School District claim of accommodation runs afoul of the Free Exercise Clause of the First Amendment. "[T]he right to conscience is not only implicated when government engages in direct or indirect coercion [but is] also implicated when the government requires individuals to support the practices of a faith with which they do not agree." *Marsh v. Chambers*, 463 U.S. at 803 (Brennan, J., dissenting). The dangerous precedent which Chapter 748 establishes is best described by Justice Kennedy when he stated in *Lee v. Weisman*, *supra* at ___, 120 L.Ed.2d at 483-484 that:

The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition of forms of state intervention in religious affairs with no precise counterpart in the speech provisions, *Buckley v. Valeo*, 424 U.S. 1, 92-93, and n.127 (1976) (per curiam). The explanation lies in the lesson of history that in the hands of government what might begin as a tolerant expression of religious vows may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

The passage of Chapter 748 can not be viewed as a mere accommodation of the "burden that result[ed] from the free exercise of religion." Rather, that legislation represents, in no uncertain terms, a wholesale acceptance and adoption of the underlying religious principles of the Satmar through the governmental formulation and granting to the insular Satmar community their own public school system and all the financial and non-financial benefits and awards which that has to offer. The delivery and receipt of needed services for the handicapped children of Kiryas Joel, upon the terms laid down by the Satmar, may neither operate as the mechanism to undermine, nor be subservient to, the clear mandate of the Establishment Clause barring any form of governmental sponsorship or support of religion.

II. BESIDES ORDERING AFFIRMANCE BASED UPON LEMON, APPLICATION OF THE STRICT SCRUTINY MANDATE OF LARSON V. VALENTE, IS A FURTHER BASIS FOR AFFIRMING THE LOWER COURT'S DETERMINATION THAT CHAPTER 748 IS UNCONSTITUTIONAL

Although concluding that *Lemon* was also transgressed, Chief Judge Judith Kaye of the court below observed, in her concurring opinion, that the preferred analytical framework for examining the constitutionality of Chapter 748 is the strict scrutiny test, as was formulated and applied in *Larson v. Valente*, 456 U.S. 228 (1982) (Pet.App. 18a-29a). Finding that Chapter 748 embodied a denominational preference or benefit in favor of the Satmar Hasidim of

Kiryas Joel (*id.* at 24a), Chief Judge Kaye concluded that, even assuming *arguendo* that the providing of special education services to Satmar children was a "compelling secular interest," the legislation was invalid since it "plainly went further than necessary to resolve the problem" (*Id.* at 25a). Rather than being narrowly tailored to fulfill the assumed compelling secular interest of providing special education services, the state legislature "remarkabl[y] act[ed]" to carve from an existing school district a new district, coterminous with a religious enclave, and vested that new district with "all of the powers of a union free school district" (*Id.* at 25a-26a). Since that legislative response vastly exceeded the supposed governmental interest which the statute was intended to address, and given the presence of more moderate, available measures (Pet.App. 27a-29a),¹⁶ Chief Judge Kay viewed Chapter 748 in violation of the Establishment Clause.

It may not be seriously challenged that Chapter 748 exclusively accords the Satmar Hasidim of the Village of Kiryas Joel a clear benefit because of their religious ideologies and practices. Cf. *Marsh v. Chambers*, 463 U.S. at 801, n. #11 (Brennan, J., dissenting). Taking exception to Chief Judge Kaye's assumption as to the presence of a governmental interest, *amici*, first, maintain that although the providing of necessary educational services to children is undoubtedly an essential governmental function, those services were at all times available from the Monroe-Woodbury School District. Essentially, Chapter 748 is duplicative legislation designed to acquiesce in the wishes of the Satmar. Since there was, in the first instance, no real and legitimate legislative void which necessitated the passage of Chapter 748, there was no underlying compelling governmental interest. Chapter 748 thus fails the strict scrutiny inquiry and must be deemed invalid.

Moreover, assuming *arguendo* the legitimate presence of an unfulfilled "compelling governmental interest," the adoption of

¹⁶ Chief Judge Kaye posits various viable narrowly tailored legislative alternatives which would not have been subject to the same claim of overbreadth (*Id.* at 537-539). She, moreover, notes the irony in the concession by the Monroe-Woodbury School District (that the "provision of secular instructional services to students of the same faith at a neutral site is constitutionally permissible," Pet.App. 29a) may indeed obviate the need for *any* corrective legislation.

Chapter 748, with the resultant creation of an entirely new school system, was clearly a legislative act which exceeded, by far, the purported governmental need sought to be fulfilled. The legislation did not, in any way, preclude the Kiryas Joel School Board from operating a full-scale public school system for all disabled, as well as non-disabled, pupils of the Kiryas Joel community. Indeed, the record shows that the Kiryas Joel School authorities were fully aware of their entitlement in this regard by having made plans to purchase a school building (with subsidized state aide revenues) for the purpose of providing kindergarten instruction for non-handicapped students (R.Brief App. pp. 24-25). "The absences of narrow tailoring suffices to establish the invalidity of the [statute]." *Church of Lukumi v. Hialeah*, ___ U.S. at ___, 124 L.Ed.2d at 499, *Wilson v. NLRB*, 920 F.2d 1282, 1287 (6th Cir. 1990).

CONCLUSION

For all of the foregoing reasons, the order and judgment of the New York Court of Appeals should be affirmed.

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App. 1

Court of Appeals
STATE OF NEW YORK

BOARD OF EDUCATION OF THE MONROE-
WOODBURY CENTRAL SCHOOL DISTRICT,

Plaintiff-Respondent,

- against -

ABRAHAM WIEDER, Individually and as the Parent and Natural Guardian of HUDES WIEDER, a Handicapped Child Under the Age of Fourteen Years; ISACK SILBERSTEIN, Individually and as the Parent and Natural Guardian of SHEINDLEE SILBERSTEIN, a Handicapped Child Under the Age of Fourteen Years; JOSEPH HIRSCH, Individually and as the parent and Natural Guardian of CHANA HIRSCH, a Handicapped Child Under the Age of Fourteen Years; ITAMAR KAUFMAN, Individually and as the Parent and Natural Guardian of RIVKA KAUFMAN, a Handicapped Child Under the Age of Fourteen Years; MOSES STERN, Individually and as the Parent and Natural Guardian of BENJAMIN STERN, A Handicapped Child Under the Age of Fourteen Years; each of the above is also named and served in this capacity as a class representative on behalf of others similarly situated,

Defendants-Appellants.

RECORD ON APPEAL

SIFF, ROSEN & PARKER, P.C.
Attorneys for Defendants-Appellants
233 Broadway
New York, New York 10279
(212) 349-3990

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INGERMAN, SMITH, GREENBERG,
GROSS, RICHMOND, HEIDELBERGER
& REICH
Attorneys for Plaintiff-Respondent
167 Main Street
Northport, New York 11768
(516) 261-8834

(Orange County Clerk's Index No. 7738/1985)

Affirmation of Menachem Friedman
Dated August 20, 1986 -
In Support of Motion (pp. 66-76)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----	X	
BOARD OF EDUCATION	:	
OF THE MONROE-WOODBURY	:	
CENTRAL SCHOOL DISTRICT,	:	Index No.
	:	7738/85
Plaintiff,	:	
ABRAHAM WIEDER, ISACK	:	Assigned Justice:
SILBERSTEIN, JOSEF HIRSCH,	:	Irving A. Green
ITAMAR KAUFMAN and	:	<u>AFFIRMATION</u>
MOSES STERN, individually	:	
and as class	:	
representatives on behalf	:	
of others similarly situated,	:	
Defendants.	:	
-----	X	

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MENACHEM FRIEDMAN affirms as follows:

1. I am Director of Special Education at the United Talmudic Academy of Kiryas Joel (Hereinafter "UTA"), which includes Bais Rochel, a girls' school, in the Village of Kiryas Joel in Orange County, New York. UTA has a total enrollment in excess of 3000.

2. The Village of Kiryas Joel is within the jurisdiction of the Board of Education of the Monroe-Woodbury Central School District (hereinafter the "Board").

3. I make this Affirmation, rather than an Affidavit, because I am prevented by my religious beliefs from swearing an oath. All of the statements contained herein are true.

4. In or about 1984 I was the person designated by UTA to deal with the Board concerning issues of special education and related services for handicapped children who were attending UTA. At that time the Board was providing services to some of the handicapped children attending UTA. These services were provided in a special wing of the UTA building which was maintained separate and apart from the regular premises of UTA and which was approved by Dr. Alexander, the Superintendent of the Board, as a neutral site.

5. The neutral site is not used for any religious purposes whatsoever and it is only utilized by handicapped children.

6. The type of services that were provided by the Board for handicapped children at the neutral site included the following: occupational therapy, physical

therapy, speech therapy, assistance to the hearing impaired and adaptive physical education.

7. The handicapped children of UTA included children who were mentally retarded, hard of hearing, deaf, speech or language impaired, seriously emotionally disturbed, orthopedically impaired as well as children with special learning disabilities who required special education and related services. Some of these children were classified as having multiple handicaps. Included among the physical handicaps were spina bifida, cerebral palsy, Down's syndrome and others. Some of the children have I.Q.'s as low as 40. Because of their handicaps, some of the children were unable to walk and some were unable to talk at all. All these children were in desperate need of assistance.

8. In addition to the physical and mental handicaps suffered by these children there is a further factor which affected the ability of these children to obtain special education and related services to the handicapped. These factors relate to the language, social and cultural backgrounds of the handicapped children enrolled in UTA. All of these children are the children of Hassidic Jewish families, whose principal language in the household is Yiddish. Yiddish is also the principal language in the entire village of Kiryas Joel. It is the practice of the Hassidic community not to use the television, radio, newspapers, magazines or other English language publications in their homes or in the Village. Thus, the handicapped children enrolled in UTA are not accustomed to the use of English in written or spoken form and many are completely unable to communicate in English, at all.

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9. Socially and culturally, the handicapped children enrolled in UTA differ from the general community in the Monroe-Woodbury district outside of the Village of Kiryas Joel.

10. The personal appearance of the handicapped children enrolled in UTA is different from the personal appearance of handicapped and non-handicapped children outside of the Village of Kiryas Joel in that:

- (a) the boys all have long side curls (known as pais) which are never cut from infancy;
- (b) the boys all wear head coverings called yarmulkes at all times, and from the age of 13 onward, wear a hat above the yarmulke; /
- (c) the boys wear no pastel colors but only dark colors and white shirts;
- (d) the boys are required to wear a fringed religious garment called tzitzis;
- (e) boys are required to wear garments that cover their arms at least to the elbow and that cover their legs at least to the ankle;
- (f) girls are required to wear garments that cover their arms at least to the wrist, and to wear dresses and skirts only that cover their legs to mid-calf;
- (g) girls are required to wear thick stockings that are full length;
- (h) girls are not allowed to wear pants or open-collared garments;
- (i) girls are not permitted to wear their hair loosely, to wear makeup or nail polish or perfume.

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11. As a matter of practice, neither boys nor girls participate in any team sports. As a matter of practice, boys and girls generally do not mix culturally or socially. Outside of the home boys and girls do not socialize together. Within the home only boys and girls of the same family socialize together, and even that relationship is limited.

12. A typical ten year old boy in the Village of Kiryas Joel would normally arise at approximately 6:30 a.m. and be in school at UTA by 7:30. He would remain in school till 6:00 p.m. in the evening at which time he would go home for dinner and return to school thereafter for an hour of evening studies at which time he would typically return home and go to bed. This routine is followed 5½ days a week, except for the Sabbath, which is spent in the Synagogue from 9:30 in the morning until 12:30. At that time the child would typically return home for lunch, followed by a rest period of approximately one or two hours, at which time the boy would resume his religious studies with his father until just prior to sundown. He would then return to the Synagogue with his father until approximately an hour and a half after sunset, at which time he would typically return home and go to bed. On the Sabbath, dinner is eaten in the Synagogue.

13. A typical ten year old girl would go to school 5 days a week from 8:30 in the morning until 4:00 in the afternoon. Upon her return home she would assist her mother with household chores and with care of younger siblings. The average family size in the Village of Kiryas Joel is approximately 10. Girls do socialize with other girls when their chores are completed. Boys also socialize but only with other boys. Neighbors are all of the same

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cultural, social and religious background. There are no people living in the Village of Kiryas Joel other than Hassidic Jews.

14. Hassidic Jews have been classified by the United States Government Minority Business Development Act as socially disadvantaged, defined under the Act as those persons who have been subjected to cultural, racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities. See Exhibit "A" annexed.

15. I personally know each of the children of the named defendants. Each of the children of the named defendants who are handicapped have been found to be handicapped by the Committee on the Handicapped of the Board pursuant to Article 89 of the New York State Education Law (Children with Handicapping Conditions) and Title 20 U.S.C. Section 1400 et seq. (Education of the Handicapped Act). The Board has admitted that each of these children is so handicapped and that each has handicapping conditions.

16. I am also familiar with all of the other handicapped children in the Village of whom 43 have already been determined by the Committee on the Handicapped of the Board to be so handicapped and to have such handicapping conditions. In addition, there are approximately 17 other severely handicapped children in Kiryas Joel who would, in my opinion, fall within the definition of handicapped children or children with handicapping conditions if examined by the Committee on the Handicapped of the Board. Annexed hereto as Exhibit "B" is a list of 60 names of handicapped children attending I.T.A.

An asterisk in the second column follows the name of each of the 43 children found to be handicapped by the Committee on the Handicapped of the Board.

17. After providing services to some of the handicapped children in the neutral site in the Village of Kiryas Joel, the Board suddenly changed its position after the end of the school year of 1984-1985. In fact, the Board led the parents to believe that all would continue as before. Some of the children were evaluated as requiring even greater services. Annexed as Exhibit "C" is a letter dated July 31, 1985 to Mr. and Mrs. Wieder which enclosed an amendment to Phase I of the Individualized Educational Program for their daughter Hudes. No warning was given that such services would not be resumed in the Fall until right before the start of the school year in the Fall of 1985. The first warnings were telephone calls to the parents of children who had received services during the prior school year and who had received notices during the summer similar to the ones sent to Mr. and Mrs. Wieder on July 31, 1985. I began to receive calls from parents telling me that the Board had advised that their children were not going to get services as they had previously gotten.

18. The gist of those phone calls was effectively to tell the parents that their children could not receive appropriate services since the Board would only give services in the regular classrooms of the public schools.

19. Special education [sic] and related services in the regular classes of public schools for these handicapped children is not appropriate [sic] special education and related services because of many factors including:

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(a) many of these children required one-on-one services which could not be rendered in regular classes of the public schools or in any other regular classes (see, for example, Affidavit of Pamela Brewster, submitted herewith);

(b) those children who could receive benefits from services with other children could not receive such benefits where the surroundings in which such benefits were provided were socially and culturally unacceptable for the appropriate provision of services (see Affidavit of Abraham Wieder, submitted herewith);

(c) many of the handicapped children would suffer severe emotional and cultural shock were they uprooted from the mainstream of the community in which they reside;

(d) those handicapped children who had previously attempted to receive services outside of the Village of Kiryas Joel had been unable to continue to receive such services because of the inappropriateness of the social and cultural surroundings (see Affidavit of Abraham Wieder, submitted herewith).

20. None of the parents of the handicapped children consented to the change in the placement of their handicapped children unilaterally mandated by the Board.

* * *

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Satmar

An Island in the City

BY

Israel Rubin

CHICAGO

Quadrangle Books

1972

Copy of "Satmar – An Island in the City" By Israel Rubin
submitted as exhibit to Judge in connection with Class
Certification Motion (pp. 272-412)

* * *

has an even wider following within Orthodoxy than its stand vis-a-vis Zionism. For example, many Orthodox institutes of higher learning have adopted during the last few decades a policy that forbids their students to attend college. The difficulty is that during the same two decades a college degree has become a prerequisite for decent employment. Can Orthodox Jews continue to ignore this reality? Aside from the occupational factor, can Orthodoxy allow itself to ignore developments in the world of Western learning at a time and in a place where Jews have become full citizens and presumably do not wish to return to a ghetto? One could even argue that the fear of being exposed to what others have to say is in itself an admission of lack of confidence in one's own

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views. He who feels confident in his stance should logically not seek to avoid confrontation with challenging alternatives.

A final aspect of this problem is a concomitant of insulation, partly a justification for it – the need to maintain internally a negative image of the outside world. This frequently results in joining hands, implicitly, with radicals (both right and left, but especially on the right) who have an equally vested interest, albeit for different reasons, in maintaining such an image of contemporary Western society. Such an alliance is, to say the least, precarious, for these same elements have traditionally been the main carriers of anti-semitism.

Opponents of insulation have not yet worked out a formula for an acceptable mode of full participation. After all, a college environment is not exactly an Orthodox Jew's dream. To mention just one example, sexual freedom is incompatible with Orthodox Jewish living, and no one has yet figured out how to insulate Orthodox college students from the strong temptations available on the campus. Nor has anyone found a way to reconcile the attitude of free inquiry with the Orthodox demand for a degree of doctrinal rigidity. At least such reconciliation has not taken place on a wide scale. As in the case of Zionism, Orthodox Jews have dealt with this problem on a

* * *

Parts Two through Four describe the sociocultural system of Satmar by dissecting the culture into its institutional components. As used here, "institution" denotes a broad cultural area which centers on a set of individual

and collective needs. Such dissection obviously involves a degree of artificiality, since institutions overlap, and of arbitrariness, for numerous behavior patterns legitimately belong to more than one institution. Yet it is logical to regard food consumption, for example, as basically an economic rather than a religious activity (except, of course, in cases where religion dictates the consumptive act itself), even though religion may prescribe the avoidance of certain foods or ceremonial procedure before or after eating.

The religious institution is our logical starting point, since religion is at the root of the Satmarer Hasidim's effort to preserve their culture. Part Two, then, considers the basic belief system, the Rov and his central role, the social relationships that involve religion generally and directly, and behavior that is primarily religious, not an adjunct to nor an adornment of a secular act.

* * *

Finally, the continued existence of Satmar is seen to depend on the success of the school.

Within this broad framework are more specific norms, chief of which is the desideratum of learning Torah and teaching it to one's sons so that they too may be able to study and obey it. Supporting Torah study are several related norms which elevate the dignity of the teacher of Torah and even of the books that contain any form of Torah. These serve as the foundation for school discipline which is thus administered in the name of the revered subject matter.

Complementing such goals as Torah study are numerous prescriptions that are expected of the school, such as to tolerate no breach of any religious law, no profanities of any kind, no degree of open disrespect, or, in short, no behavior that threatens the community's self-imposed standards.

In the secular department of the boys' school and in the girls' school as a whole, there appears to be as yet no rationale other than the desire to comply somehow with the law and thus maintain the frequent claim to good citizenship and loyalty. Some expectations are beginning to emerge, however. For example, now that the English department exists anyway, many parents have begun to feel that this department ought to teach the boys the English language, for the parents themselves feel a need to learn it. Abroad the girls were permitted to attend public schools and many a parent began to display pride in a daughter's high grades, if for no other reason than as an indicator of the girl's "brightness." This same motivation continues to be apparent in the United States. As for the girls' Jewish studies department, a great deal of confusion about its purpose still existed a decade after its coming into being. Conservative elements which felt guilty about its presence have, at best, hoped that it will do no harm. The more liberal parents, however, have begun to feel that it may also be performing a positive service, namely, to teach the girls those essentials of

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during which any physical contacts is to be avoided. In fact, any public mention of the topic meets with disapproval.

In the realm of work, we recall the strong proscriptions regarding work on Saturday and major holidays, proscriptions that cannot be violated without automatic expulsion from the community. In addition, the culture encourages, though it does not strictly demand, full or partial refrain from work on numerous days of lesser significance.

Food regulations are equally extensive and strict. Not only are Satmarer – like all Orthodox Jews – required to follow certain procedures in the processing of meat and dairy products or Passover foods, but they follow these rules according to the strictest interpretations and hence limit their trust in these matters to members of their own or culturally similar communities.

Secular education beyond a rudimentary knowledge of the “three R’s” is limited to occasional technical training, preferably outside the walls of institutes of higher learning. Colleges and universities are mysterious unknown territory and are thought to offer, along with some useful technical knowledge, instruction in heresy in an environment free of all moral restraints. A full college education is thus beyond the reach of any Satmar man or woman.

Finally, prestige in Satmar requires conformance to the semi-formal code governing outward appearance, which especially affects males. They wear beards, dangling sideburns, special hats, long dark coats, and, on Saturdays, a shtraamel and kaaftan. The result is, naturally, an unmistakable appearance which allows instant identification of a member of Satmar or a similar group.

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The strains results from these regulations are numerous. In the case of sex life, it is rather obvious that from early childhood onward one must curb his temptation for any physical or social contact with a member of the opposite sex other than a spouse. Even in marital life, the extensive post-menstrual

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Affidavit of Dr. Daniel Alexander

Sworn to September 15, 1986 -

In Opposition to Motion and

In Support of Cross-Motion (pp. 110-148)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

BOARD OF EDUCATION
OF THE MONROE-WOODBURY
CENTRAL SCHOOL DISTRICT,

Plaintiff,

- against -

ABRAHAM WIEDER, ISACK SILBERSTEIN, JOSEF HIRSCH, ITAMAR KAUFMAN and MOSES STERN, individually and as class representatives on behalf of others similarly situated,

Defendants.

AFFIDAVIT IN OPPOSITION

Index No.
7738/85

Assigned Justice:
Irving A. Green

STATE OF NEW YORK)
) ss.:
COUNTY OF ORANGE)

DR. DANIEL ALEXANDER, being duly sworn,
deposes and says:

1. I am Superintendent of School and Chief Executive Officer of plaintiff Board of education of the Monroe-

Woodbury Central School District and am personally familiar with the facts and circumstances hereinafter set forth.

2. I submit the within affidavit in opposition to defendants' motion for preliminary injunctive and further relief and in support of plaintiff's cross-motion to dismiss the counterclaims of defendants for legal insufficiency and for judgment pursuant to the provisions of CPLR §3001 declaring that plaintiff Board of Education, in compliance with its obligation under federal and state law, may furnish the handicapped children residing within or proximate to the Village of Kiryas Joel who are attending private schools at the volition of their parents with special education and related services of an instructional, remedial and therapeutic nature only in the regular classes of the public schools and not separately from pupils regularly attending the public schools.

3. Annexed hereto and incorporated herein as Exhibits "A" through "C" respectively are plaintiff's Complaint, defendants' Answer and plaintiff's Reply thereto.

4. The Incorporated Village of Kiryas Joel lies within the boundaries of the Monroe-Woodbury Central School District.

5. Upon information and belief, the Village consists almost exclusively of members of the Orthodox Jewish community commonly known as Satmar Hasidim or Satmarer.

6. Upon information and belief, and as is more fully described in the undated affirmation of Menachem Friedman submitted in support of defendants' motion for preliminary injunctive and further relief and from a treatise entitled "Satmar-An Island in the City" by Israel Rubin, a copy of which was previously annexed to plaintiff's supplemental submission to the Court in connection with its motion for class certification, which Treatise is incorporated by reference herein, the Satmar Hasidim live an existence which is culturally and socially vastly distinct from that of the general community within the Monroe-Woodbury Central School District.

7. Upon information and belief, with extremely rare exceptions, the Satmarer do not send their children to the public schools of the District but choose instead to educate their children within the parochial schools of the Village.

8. Upon information and belief, the Satmarer within Kiryas Joel have organized the United Talmudic Academy of Kiryas Joel which includes Bais Rochel, a girls' school located within the Village; as more fully appears from the undated affirmation of Menachem Friedman, the United Talmudic Academy as a total enrollment in excess of three thousand students.

9. Upon information and belief, among the reasons for the refusal of the Satmarer to send their children to the public schools of the District are the existence of religious doctrines prohibiting the mixing of sexes, various curriculum-based distinctions which the religion dictates in connection with the selection of curriculum appropriate for male and for female students and the

preference for instruction in Yiddish rather than in English.

10. Upon information and belief, the underlying goals and objectives of the United Talmudic Academy differ radically from the goals and objectives of public educational systems.

11. The Rubin Treatise describes the foundation of the religious educational system in the following manner:

"The underlying norm that serves as a foundation of and rationale for the educational system is the high value placed upon bringing up children who will continue to live by the religious standards of their parents. It is a value with individual, familial, and community dimensions. Individually, each person is under strict religious obligation to transfer the Torah heritage to his offspring. The fulfillment of this mizvah is taken to be among the main purposes of life on earth and even in the world to come, for the soul is believed to benefit from having left behind worthy children, whereas dying without this accomplishment is considered tragic . . .

"Within this board framework, are more specific norms, chief of which is the desideratum of learning Torah and teaching it to one's sons so that they too may be able to study and obey it . . .

* * *

"In the secular department of the boys' school and in the girls' school as a whole, there appears to be as yet no rationale other than the desire to comply somehow with the law and

thus maintain the frequent claim to good citizenship and loyalty". (at Pages 138, 139)

12. As the Rubin Treatise indicates, upon information and belief, the Satmarer have not regarded their school as having any significant relationship to one's occupational role in adulthood; thus, an essential component of a public educational system to train students toward an occupational role is absent within the schools of the Village.

13. The Rubin Treatise summarizes:

"In summary, the Satmarer want their school to serve primarily as a bastion against undesirable acculturation, as a training ground for Torah knowledge in the case of boys, and, in the case of girls, as a place to gather knowledge they will need as adult women. Only in a minor way do the Satmarer want their school as a place to receive knowledge that may one day be put to a practical use in earning money." (at Page 140)

14. Upon information and belief, it is readily apparent from the foregoing that the schools within the United Talmudic Academy are pervasively sectarian in atmosphere and in purpose and are designed to inculcate the religious values and beliefs of the Community, rather than to provide secular academic instruction.

15. Upon information and belief, it is further evident that what limited secular education which such schools provide goes hand in hand with the religious mission which is the primary and dominant reason for the schools' existence.

16. Upon information and belief, it is clearly settled that a parent has a right to withdraw his or her child from the public schools of a district and to educate that child in a private or parochial school of the parent's choice.

17. What is at issue herein is not the validity of defendants' decisions to decline to enroll their children in the public schools of the District but rather the legal consequences which flow therefrom.

PRELIMINARY ALLEGATIONS WITH RESPECT TO
AVAILABILITY OF SERVICES TO NON-PUBLIC
SCHOOL STUDENTS

18. Upon information and belief, it is a well-settled principle of law that a student fulfills his or her compulsory education law requirements either by attending a public school within the home school district or by attending a non-public school at the expense and volition of the parent.

19. Upon information and belief, the Education Law contains certain narrowly-defined exceptions to the premise that a child enrolled at the volition of his parent in a parochial school may not avail himself of the programs and services of the public school district.

20. Article 11, § 3 of the Constitution of the State of New York provides as follows:

"Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or

in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

21. Upon information and belief, subject to the constitutional limitation above-cited, boards of education have extremely limited authority to provide services to parochial school students.

22. Upon information and belief, Article 73 of the Education Law and, more particularly, § 3635 thereof, authorizes and requires provision of transportation from home to school of children attending public and non-public schools.

23. Upon information and belief, Section 912 of the Education Law authorizes and requires provision of "health" and "welfare" services, as the terms are therein defined, to all children, without regard to school affiliation.

24. Upon information and belief, Articles 15 and 16 of the Education Law authorize and require the lending of textbooks, text-substitutes and certain computer software programs of a non-denominational nature to pupils enrolled in public and in parochial schools.

25. Upon information and belief, Education Law § 3602-c provides a statutory procedure by which children enrolled in private or parochial schools may participate in

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special education and related services to defendants except in accordance with the subject to the limitations contained in Education Law § 3602-c, subdivision 9, and defendants' counterclaims should be dismissed for legal insufficiency.

/s/ Daniel Alexander
DR. DANIEL ALEXANDER

Sworn to before me this
15th day of September, 1986.

/s/ Ilene E. Gilmore
Notary Public

ILENE E. GILMORE
Notary Public, State of New York
No. 4776274
Qualified in Orange County
Commission Expires 9/30/88

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2. I have served in this capacity since in or about June, 1985.

3. I am permanently certified by the New York State Education Department to serve as a school district administrator and, in addition, I hold certification as a school psychologist and as a teacher.

4. I submit the within affidavit in support of plaintiff's motion for summary judgment and in opposition to defendants' motion for preliminary injunctive and further relief.

5. I am fully familiar with the facts and circumstances hereinafter set forth, both from my personal involvement therein and from my review of the educational records and related documents maintained by the District in the ordinary course of business.

6. Upon information and belief, I have read the affirmations of Menachem Friedman and Abraham Wieder and believe that they contain significant mistakes and distortions with respect to the relevant facts and circumstances concerning prior District attempts to provide programs and services to Satmar Hasidic children.

7. Upon information and belief, the District has been and continues to be ready and willing to provide special education and related services to the infant defendants, and no child has been denied or deprived of services to which he or she is entitled by virtue of the actions of the plaintiff herein.

8. Upon information and belief, substantial programs and services were offered and furnished to Satmar Hasidic children.

9. Upon information and belief, among the services extended were: (a) two hearing-impaired children were evaluated and fitted with auditory trainers; (b) three hearing-impaired children received daily remediation in the academics in addition to two sessions a week of individual speech therapy aided at improving their receptive and expressive skills, lip-reading skills and auditory training skills; (c) all children referred for speech were screened by a speech therapist, and fifteen were given speech therapy; (d) two teachers providing remediation to the hearing-impaired children were given one hour per week of consultative services from a certified teacher of the deaf in order to improve the effectiveness of their work with children; (e) two hearing-impaired children received two hours per week of services of a teacher of the deaf in addition to speech therapy; (f) a multiply handicapped child received two sessions of physical therapy and two sessions of occupational therapy per week; (g) another child was provided with occupational therapy; (h) another district employee was assigned to work with a group of Hasidic children on a weekly basis in a program designed to improve their gross and fine motor coordination; (i) a part-time speech therapist was hired to provide speech therapy to a greater number of students; (j) a school psychologist did numerous psychological evaluations on Hasidic children.

10. Upon information and belief, the contrary is true, since the adult defendants have engaged in a course of conduct pursuant to which they have made it impossible for the plaintiff District to fulfill its responsibilities in a manner consistent with statute and constitutional limitations.

11. Upon information and belief, I have reviewed the affidavit of Daniel Alexander sworn to the 15th day of September, 1986 and am in agreement with the assertions therein contained that the District has attempted to serve the needs of the infant defendants, and that any failure to receive such services was directly attributable to the intransigence of the adult defendants who have consistently refused to accept services in the manner proffered by plaintiff.

12. Upon information and belief, defendants allege that as a result of linguistic and cultural differences that their children cannot be educated in the regular classes of the public school.

13. Upon information and belief, past history and practice contains many illustrations to the contrary, where Hasidic children have adjusted satisfactorily to a public educational setting.

14. Upon information and belief, during the 1983-84 school year, five Hasidic students were enrolled by their parents in public school programs for the handicapped.

15. Upon information and belief, while many of these children were subsequently withdrawn from the program at the volition of their parents, such withdrawal was not because the programs had not been successful in accommodating the needs of such children but represented a parental choice to withdraw services from the students at that educational setting.

16. Upon information and belief, three Hasidic children were enrolled in the public schools or educated by

contract with the public schools, each of whom accepted services and remained throughout the entire school year.

17. Upon information and belief, during the 1985-86 school year, three Hasidic children were placed in the public schools or through contract with the public schools.

18. Upon information and belief, while two of the children were withdrawn from the program, it was not for lack of success of such programs in meeting the needs of the children but represented a parental choice to discontinue services.

19. Upon information and belief, I have reviewed progress reports and educational records of the public schools concerning the educational placement of the Satmar children within the public schools, have had discussions with classroom teachers and administrators, and have concluded therefrom that the students actually made direct and positive progress therein.

20. Upon information and belief, I served as Chairperson of the Committee on the Handicapped, commencing in June, 1985.

21. Upon information and belief, in my capacity as Chairperson of the Committee on the Handicapped, I conducted numerous annual reviews as to the status and programs of handicapped children in the district, including Satmar Hasidic children.

22. Upon information and belief, I am familiar with the past history of attempts to serve the needs of handicapped children at the annex to Bais Rochel and of the

fact that serious concerns were expressed with respect to the constitutionality of delivery of services threat.

23. Upon information and belief, in or about July, 1985, the District determined to discontinue provisions of services which were instructional, remedial or therapeutic at the annex to Bais Rochel.

24. Upon information and belief, such determination was compelled by the then contemporaneous decisions of the United States Supreme Court in the *Aguilar* and *Grand Rapids* cases, more fully discussed in the affidavit of Daniel Alexander sworn to September 15, 1986 and by the demand of the Satmarer for education, dual-enrollment, rather than health and welfare services.

25. Upon information and belief, during the preceding year, approximately forty-nine students received speech and language screening at the annex; fifteen students received speech improvement services; two students received occupational therapy; and one student received physical therapy.

26. Upon information and belief, services were neither withdrawn nor curtailed in connection with the determination to withdraw services from the annex to Bais Rochel and to provide the Satmar students with services in the regular classes of the public schools in accordance with law.

27. Upon information and belief, annexed hereto and incorporated herein as Exhibit "A" through "E" are the Minutes of the Meetings of the Committee on the

Handicapped in connection with Committee consideration of the annual reviews of the five individual infant defendants.

28. Upon information and belief, in no instance was the nature or level of services diminished, but, to the contrary, as in the case of Hudes Weider, in some instances services were actually enhanced or augmented.

29. The Committee on the Handicapped experienced continued frustration with the intransigent refusal of the Satmar Hasidim to accept programs or services in other than the annex to Bais Rochel.

30. As Chairperson of the Committee on the Handicapped, I directed my staff to reach out to the Hasidic Community to encourage acceptance of services and programs, but such attempts to secure voluntary cooperation met with at best extremely limited success and frustration.

31. Upon information and belief, in the overwhelming majority of instances, Hasidic parents declined to accept services, except upon terms and conditions which they sought to impose as the condition to receive such services.

32. Upon information and belief, Hasidic parents declined to attend meetings of the Committee on the Handicapped, declined to sign their student's Individual Education Plan, declined to attend scheduled meetings or conferences and refused to cooperate with the statutory operations or functions of the Committee.

33. Upon information and belief, I have reviewed those allegations of the counterclaim which allege that

the Committee deprived Hudes Wieder of programs and services to which she was entitled to under law and believe that there is no legal merit thereto.

* * *

technique for developing greater English-language facility among non-English speakers.

86. Upon information and belief, no Satmar Hasidic family has requested that their child be enrolled in a public bilingual program or an English-as-a-Second-Language program, but, to the contrary, the Satmarer have requested and demanded that all services for their children be provided in Yiddish as the primary language of instruction.

87. Upon information and belief, a public school may furnish programs and services only in the manner authorized or required by law.

88. Upon information and belief, a public school may not accommodate a parental request to dispense with the requirement that English be the language of instruction, other than in a bilingual or English as a second language program designed to facilitate the English speaking ability of non-English speaking students, lest students be separated and segregated by native language.

89. Upon information and belief, the adult defendants further suggest that the Committee has been insensitive to the language issue at the level of the Committee on the Handicapped.

90 Upon information and belief, annexed hereto and incorporated herein collectively as Exhibit "K" are

copies of the various Committee on the Handicapped forms, which forms are written in both English and in Yiddish.

91. Upon information and belief, the Committee has indicated the availability of a Yiddish-English translator, should any parent be unable to communicate in the English language at a meeting of the Committee on the Handicapped.

92. Upon information and belief, I join in plaintiff's motion for judgment construing the statute in the manner set forth in plaintiff's prayer for relief and in its demand for judgment dismissing the counterclaims for legal insufficiency.

/s/ Philip R. Paterno
PHILIP R. PATERNO

Sworn to before me this
16th day of September, 1986.

/s/ Ilene E. Gilmore
Notary Public

ILENE E. GILMORE
Notary Public, State of New York
No. 4776274
Qualified in Orange County
Commission Expires 9/30/88

The University of
the State of New York,
The State Education Department
Instruction and Program
Development Team 1
Albany, New York 12234

State of New York
Office of the State Comptroller
Division of Municipal Affairs
Albany, New York 12236

44-12-02-02-0000

KIRYAS JOEL VILLAGE UFSD
C/O-SUPRTNDENT-DR STEVEN BENARDO
500 FOREST RD
MONROE NY 10950

COMPLETED

FORM ST-3
ANNUAL FINANCIAL REPORT
BASED ON DOUBLE-ENTRY ACCOUNTING
FISCAL YEAR ENDED JUNE 30, 1993

Name of School District Kiryas Joel Village Union Free
School District County Orange Supervisory District _____

FILING INSTRUCTIONS (ALL DISTRICTS EXCEPT NEW
YORK CITY)

Each district (except New York City) should produce two
photocopies (except where noted) of this report before
September 1, 1993 and transmit as follows:

- (1) **The signed original** mailed to the Regional
Information Center for processing;
- (2) One **photocopy** mailed directly to the
Office of the State Comptroller, Bureau of
Municipal Research and Statistics, Alfred E.

Smith Office Building, 10th Floor, Albany,
NY 12236;

- (3) One **photocopy** mailed to the BOCES District Superintendent of the BOCES of location (not applicable to non-component district).

CERTIFICATION

This report should be certified by the district treasurer except:

- (1) *in a financially dependent school district (Buffalo, Rochester, Syracuse, Yonkers, and New York City) by the chief fiscal officer;*
- (2) *in a common school district which does not have a treasurer, by the sole trustee or chairperson of the Board of Education.*

I, _____ certify that this report, to the best of my knowledge, upon information and belief, is a true and correct statement of the financial transactions of the school district for the fiscal year ended June 30, 1993.

Signed:/s/ _____
Date _____
Title: Treasurer (or) _____
RECEIVED

Oct 25, 1993

BUREAU OF
MUNICIPAL RESEARCH

Schedule A3
(Continued)

GENERAL FUND - REVENUES
FISCAL YEAR ENDED JUNE 30, 1993

NAME OF ACCOUNT	ACCOUNT CODE	DP CODE 48	REVENUES
Miscellaneous			
Refund of Prior Years Expenditures:			
a. Refund for BOCES Services Approved for Aid	A2701	59	\$
b. Refund of Transportation Expenditures	A2702	60	
c. Refunds, Other (Specify) _____	A2703	61	78
Gifts and Donations	A2705	62	
Other Unclassified Revenues (Specify) _____			
_____	A2770	63	
Total Miscellaneous	AT2799	64	\$ 78
Interfund Revenues			
Interfund Revenues			
State Aid			
_____	A2801	65	\$ 21,398
Loss of Public Utility Valuation	A3017	66	\$
Records Management	A3060	67	
Basic Formula Aid (See Instruction Manual)	A3101	68	391,241
Lottery Aid	A3102	69	
Boards of Cooperative Education Services	A3103	70	2,643
Tuition and Transportation for Students with Disabilities (Chapters 47, 66 and 721)	A3104	71	
Textbook Aid (including Textbook/Lottery Aid)	A3260	72	81,494
Special Aid for Small City School Districts	A3261	73	
Computer Software Aid	A3262	74	9,096
Library A/V Loan Program Aid	A3263	75	12,267
Other State Aid (See Instruction Manual) _____			
_____	A3289	76	
Youth Programs	A3820	77	
Total State Aid	AT3999	78	\$ 496,741

FEB 22 1994

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL
VILLAGE SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

LOUIS GRUMET AND ALBERT W. HAWK,

Respondents.

On Writ Of Certiorari
To The New York Court Of Appeals

BRIEF AMICUS CURIAE OF AMERICANS UNITED
FOR SEPARATION OF CHURCH AND STATE, AMERI-
CAN JEWISH COMMITTEE, ANTI-DEFAMATION
LEAGUE, AMERICAN CIVIL LIBERTIES UNION,
NATIONAL COUNCIL OF JEWISH WOMEN, AND
THE UNITARIAN UNIVERSALIST ASSOCIATION, IN
SUPPORT OF RESPONDENTS

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JEFFREY P. SINENSKY
STEVEN M. FREEMAN
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No. 93-517, 93-527, 93-539

In the
Supreme Court of the United States

October Term, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL
VILLAGE SCHOOL DISTRICT,

Petitioner,

v.

LOUIS GRUMET AND ALBERT W. HAWK,

Respondents.

On Writ of Certiorari
To The New York Court Of Appeals

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR
SEPARATION OF CHURCH AND STATE, AMERICAN
JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE,
AMERICAN CIVIL LIBERTIES UNION, NATIONAL
COUNCIL OF JEWISH WOMEN, AND THE UNITARIAN
UNIVERSALIST ASSOCIATION, IN SUPPORT OF
RESPONDENT

INTERESTS OF *AMICI CURIAE*

The interest of each *amicus curiae* is set forth in the
appendix hereto. The letters from the parties consenting to the
filing of this brief have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

Amici adopt the statement of facts in Respondent's brief.

ARGUMENT

I. CHAPTER 748 VIOLATES CORE PRINCIPLES OF NONESTABLISHMENT BY REALIGNING GOVERNMENTAL STRUCTURES IN A WAY THAT MAXIMIZES A RELIGIOUS COMMUNITY'S CONTROL OVER AN AGENCY OF GOVERNMENT

A. By Creating the Kiryas Joel Village School District the State has Enacted a Law Respecting an Establishment of Religion

This case is not about whether the children of the Kiryas Joel community are entitled to receive special educational services pursuant to applicable laws. *Amici* acknowledge that all children, irrespective of their enrollment in public, private or sectarian schools, are entitled to receive "comparable" educational services under the law. *Wheeler v. Barrera*, 417 U.S. 402, 420-421 (1974).¹

¹ *Amici* also do not question the right of Satmar Hasidic parents to educate their children in a manner that conforms with the practices and tenets of their religious faith, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), a faith that exhorts its adherents to eschew all but the most necessary contacts with the greater secular culture. Record on Appeal (R.) at 464.

Instead, the issue before the Court is whether the creation of a separate school district that, *by design*, conforms to the geographic boundaries of an insular religious community and is controlled and operated by the same religious enclave, is a constitutionally valid mechanism for delivering such services. As was true for the New York Court of Appeals in earlier litigation concerning the provision of special educational services to the Kiryas Joel community, *Board of Education of the Monroe-Woodbury C.S.D. v. Wieder*, 72 N.Y.2d 174 (1988), this Court is not being called upon to judge all solutions but this solution only.

Consequently, the narrow issue here is whether this solution -- the purposeful creation of a fully operational school district that is coterminous with the boundaries of an insular religious community and is controlled by members of that sect -- is constitutionally appropriate.² *Amici* contend that it is not. By intentionally creating a separate public school district that is geographically coincident to the boundaries of a religious community, the State of New York has expressly empowered that community to operate a unit of government.³ This purposeful

² As such, the issue before this Court is not whether some other alternative -- such as a neutral site -- may be constitutionally acceptable or whether Chapter 748 is "analogous" to a neutral site. See Brief for the Petitioner Kiryas Joel Village School District (KJVSD Brief), at 30. Nonestablishment is not merely an inquiry into the legitimacy of governmental ends but is also an examination into the means to accomplish those ends. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123-124 (1982); cf. *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978) ("the evil of protectionism can reside in legislative means as well as legislative ends.").

³ The Record on Appeal and the prior litigation involving the Satmar Hasidic community of Kiryas Joel conclusively establish the close relationship between the religious community, the Village, and Kiryas Joel Village School District (KJVSD). R. 492 ¶ 7; 514-616; Joint Appendix (J.A.) at 10. As one example of the intertwining relationships between the religious community and governmental agencies, Abraham Weider serves as president of the Village's main synagogue, Congregation Yetev Lev D'Satmar, as a trustee of the community's main yeshiva, as Deputy Mayor of the Village, and as president of the Kiryas Joel Village School Board. *N.Y. Times*, Jan. 5, 1994, at A15; *Village Voice*, Dec. 21, 1993, at 31.

delegation of governmental authority to a religious entity violates core notions of nonestablishment of religion going back to our nation's founding. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982).

The Establishment Clause of the First Amendment was designed to do more than forbid the creation of a national church. As Chief Justice Warren declared in *McGowan v. Maryland*, the First Amendment, "in its final form, did not simply bar a congressional enactment establishing a church; it forbade all laws respecting an establishment of religion. Thus, this Court has given the Amendment a broad interpretation . . . in light of its history and the evils it was designed forever to suppress." 366 U.S. 420, 441-442 (1961); accord, *Lee v. Weisman*, 505 U.S. ---, 112 S. Ct. 2649, 2669-70 (1992)(Souter, J., concurring); *School District of Grand Rapids v. Ball*, 473 U.S. 373, 381 (1985)(the Establishment Clause is "more than a pledge that no single religion will be designated as a state religion.")⁴ Time and again, this Court has acknowledged that "a law may be one 'respecting' the forbidden objective while

As described by the Appellate Division below:

Chapter 748 created a school district coterminous with the Village which is inhabited by residents who are almost exclusively of one religious sect. The school board is controlled by members of that sect and the children who attend the public school established by the district are all of that sect. . . . [T]he services which were otherwise available at the public schools of the Monroe-Woodbury District are now provided by a public school that is controlled by and located within the religious community.

187 A.D.2d at 22.

⁴ "We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.'" *McCullum v. Board of Education*, 333 U.S. 203, 213 (1948)(Frankfurter, J., concurring). Accord, *Everson v. Board of Education*, 330 U.S. 1, 31 (1947)(Rutledge, J., dissenting)("Not simply an established church, but any law respecting an establishment of religion is forbidden.").

falling short of its total realization." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Everson v. Board of Education*, 330 U.S. 1 (1947). This "spacious conception of separation of church and state," as Justice Frankfurter characterized in *McCollum v. Board of Education*, 333 U.S. 202, 213 (1948), has been understood to mean:

that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, *may not delegate a governmental power to a religious institution*, and may not involve itself too deeply in such an institution's affairs.

Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 590-591 (1989)(emphasis supplied). Thus, at the most fundamental level, the Establishment Clause prohibits the realigning of government structures to meet the needs of a religious community, as well as the granting of governmental authority to such communities. As this Court stated in *Larkin v. Grendel's Den*, "[t]he Framers did not set up a system of government in which important . . . governmental powers would be delegated to or shared with religious institutions." 459 U.S. at 127.⁵

Few political arrangements come closer to violating this core notion of a religious establishment than the creation of KJVSD. By purposefully creating a separate school district that conforms to the religious practices of a religious community, the State has

⁵ Justice Powell engaged in wishful thinking in declaring that:

At this point in the 20th Century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. The risk of significant religious or denominational control over our democratic processes -- or even of deep political division along religious lines -- is remote.

Wolman v. Walter, 433 U.S. 229, 263 (1977)(Powell, J., concurring).

effectively delegated to that religious community the authority to operate an agency of government. That the Establishment Clause bars the delegation of governmental authority to religious entities while it forbids the appearance of joint enterprises between religion and government finds its roots in the most basic concerns of the Framers of the Constitution.⁶ At the conclusion of the Revolution, religious establishments involved much more than financial support for religious worship. On one level, establishments provided special privileges to recognized churches through the licensing of ministers, the incorporation of churches, and the provision of glebe lands.⁷ But establishment also meant that rights, privileges and benefits of citizenship were tied to membership in approved churches through religious qualifications for office-holding, service on juries and witness testimony in courts of law. L. Levy, The Establishment Clause 1-6 (1986); M. Borden, Jews, Turks, and Infidels 11-15 (1984); L. Pfeffer, Church, State and Freedom 78, 106-107 (1967).⁸ Direct opposition to the "historically and constitutionally discredited policy" of tying one's standing in the political community to matters of faith led the Framers to adopt Article VI, section 3 of the Constitution as a guarantee that political standing was no longer

⁶ As Justice Kennedy observed in *Allegheny*, we must look for "results consistent with our precedents and the historical practices that, by tradition, have informed our First Amendment Jurisprudence." 492 U.S. at 669.

⁷ At the conclusion of the Revolution, the constitutions and laws of eight states still provided for varying forms of multiple establishments through assessments in support of religious worship. Only established churches could own land, receive bequests, or sue in courts to enforce their rights. L. Pfeffer, Church, State and Freedom 107-119 (1967); L. Levy, The Establishment Clause 4-6 (1986).

⁸ Eleven of the thirteen original states restricted public officeholding and other official duties to Christians or Protestants, although four removed or modified their restrictions by the time of the ratification of the First Amendment. T. Curry, The First Freedoms 221-222 (1986). According to Professor Borden, Jews were not considered full citizens in Rhode Island until the passage of the 1842 Constitution. Borden, *supra*, at 13.

dependent upon matters of faith. *Torcaso v. Watkins*, 367 U.S. 488, 494 (1961).⁹

In addition to these concerns, the Framers also sought to avoid "the danger of political oppression through a union of civil and ecclesiastical control" that existed under establishments of religion. *Larkin*, 459 U.S. at 127 n.10. Colonial established churches performed quasi-governmental duties through their exclusive authority to record births, perform marriages and operate early public schools. This exercise of civil authority by religious entities, what John Adams termed the conjoining of "temporal and spiritual tyranny," was seen by the Framers as an event totally "calamitous to human liberty." B. Bailyn, The Ideological Origins of the American Revolution 97 (1967). Historians have long recognized how the controversy surrounding the proposed appointment of an Anglican Bishop in the American colonies was a precipitating factor in bringing about the Revolution. A. Cross, The Anglican Episcopate and the American Colonies (1902); C. Bridenbaugh, Mitre and Sceptre: Transatlantic Faiths, Ideas, Personalities and Politics, 1689-1775 (1962). In particular, colonists feared that the social and political influence of the English episcopate would take root in America, thus empowering the established church to exercise greater influence in matters of state. According to John Adams, this aversion to the exercise of political authority by religious entities contributed "as much as any other cause" to the Revolution and eventual disestablishment. A. Stokes, Church and State in the United States vol. 1 at 231-240 (1950).

Thus, concern over the "silent accumulations and encroachments of Ecclesiastical Bodies" on the new democratic government, Madison, *Detached Memoranda* (1832), in R. Alley, ed., James Madison on Religious Liberty 89 (1985), was a leading

⁹ "[T]he religious liberty protected in the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community." *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985)(O'Connor, J., concurring).

"animating Principle[] behind the adoption of the Establishment Clause." *Lee*, 112 S. Ct. at 2661. The Establishment Clause was written in part to ensure that religious organizations were bereft of all civil authority. The Court acknowledged this purpose in one of its earliest church-state cases by declaring that "[t]he structure of our government has, for the preservation of civil liberty, rescued temporal institutions from religious interference." *Watson v. Jones*, 13 Wall. 679, 730 (1872)(quoting *Harmon v. Dreher*, 1 Speers Eq. 87, 120 (S.C. 1843)).

This understanding that nonestablishment forbids joint church-state operations and the delegation of civil authority to religious entities was adhered to in the nineteenth century. A few examples are instructive. On February 21, 1811, President James Madison vetoed a bill that would have authorized a District of Columbia church to educate local poor children, stating that it "would be a precedent for giving to religious societies as such a legal agency in carrying into effect a public and civic duty." *Veto Message*, Feb. 21, 1811, in Alley, *supra*, at 79. In 1841, the New York Legislature expressly rejected a proposal by state Superintendent of Schools John Spencer that would have allowed Catholic parochial schools to serve as "public" schools in Catholic wards. Although a handful of New York school districts later made separate agreements with Catholic churches for the joint operation of public schools, these arrangements were highly controversial and ultimately led to the enactment of a new constitutional amendment forbidding the use of any public monies for any school "wholly or in part under the control or direction of any religious denomination." J. Pratt, Religion, Politics, and Diversity: The Church-State Theme in New York History 182-187, 226, 252 (1967).¹⁰ Courts in other states concurred with this view by striking down similar proposals that would have authorized religious-

¹⁰ New York Constitution of 1894, article IX, section 4, now article XI, section 3. The 1841 proposal followed the New York City Common Council's denial of Roman Catholic requests for a share of the common school fund for parochial schools. *Id.* at 174-186; accord, D. Ravitch, The Great School Wars 33-66 (1974).

charitable entities to levy taxes for the operation of privately-run public schools. See *People v. McAdams*, 82 Ill. 356 (1876); *Jenkins v. Inhabitants of Andover*, 103 Mass. 94 (1869).

The small number of reported cases in this century involving delegation of governmental authority to religious entities indicates wide acceptance of this principle. In those few cases addressing this issue, courts have spoken with a clarity of voice that such grants violate core principles of nonestablishment. *Larkin, supra*; *Barghout v. Mayor and City Council of Baltimore*, 833 F. Supp. 540, 549 (D. Md. 1993)(Kosher ordinance in question "identifies orthodox Judaism as the recipient of civil authority."); *Oregon v. Rajneeshpuram*, 598 F. Supp. 1208, 1215 (D. Oregon 1984) (municipality run by religious organization constitutes a joint exercise of legislative authority by church and state); *State v. Clemer*, 80 N.J. 405, 404 A.2d 1 (1979)(delegation of municipal powers to religious campground violates Establishment Clause); *People v. Rose*, 82 Misc. 2d 429, 368 N.Y.S.2d 387, 391 (Sup. 1975) (invalidating judicial proceeding held in religious school).¹¹ As the New Jersey Supreme Court declared in *Clemer*, "there can be no question but that at a minimum [the First Amendment] precludes a state from ceding governmental powers to a religious organization." 404 A.2d at 6.

In recent years this Court has articulated the prohibition represented through this constitutional norm in several ways. The Court has held that the Establishment Clause forbids creating a "crucial symbolic link between government and religion," *Grand Rapids*, 473 U.S. at 385, "foster[ing] a close identification of [government] powers and responsibilities with . . . religious denominations," *id.* at 389; "delegating governmental power to

¹¹ Cf. *Ran-Dav's County Kosher, Inc., v. State*, 129 N.J. 141, 158, 608 A.2d 1353, 1361 (1992)(civil enforcement of religious law by religious personnel unconstitutional); *Spacco v. Bridgewater School Dept.*, 722 F. Supp. 834, 844-847 (D. Mass. 1989)(municipal lease of Catholic parish center requiring that use conform with teachings of the Catholic Church invalid).

religious institutions," *Larkin*, 459 U.S. at 123; creating "the mere appearance of a joint exercise of legislative authority by Church and State," *id.* at 125; and creating "a fusion of governmental and religious functions." *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963).¹² Regardless of the exact phrasing, the Establishment Clause bars the creation of a public school district that is coincident with and controlled by a religious enclave.

The Court should not be diverted by Petitioner KJVSD's argument that the New York Court of Appeals' decision denies Village residents their rights to self-determination and of local control. The record is uncontroverted, and Petitioner readily acknowledges, that the Village is an insular religious community, a religious enclave, with a Village school board comprised solely of Satmar Hasidics. KJVSD Brief at 3-4, 33-34; *See* n.3, *supra*. But unlike possible arrangements in other religiously homogeneous communities, KJVSD was created with the express purpose of vesting a religious community with political authority.¹³ As such, this case is fundamentally different from *McDaniel v. Paty*, 435 U.S. 618 (1978), which struck down a state law disqualifying clergy from holding legislative office. In contrast to the law in *McDaniel*, Chapter 748 effectively guarantees a religious community's control and operation of a unit of government. This the Establishment Clause cannot allow. History has taught that a "free democratic

¹² Alternatively, Justice Kennedy has observed that the delegation of official powers to religious groups can be seen as involving the coercive power of the government, thus constituting the "first step down the road to an establishment of religion." *Allegheny*, 492 U.S. at 660, 664 (Kennedy, J., concurring and dissenting).

¹³ Because of the "sensitive relationship between religion and government in the education of our children," *Grand Rapids*, 473 U.S. at 383, this Court can find Chapter 748 unconstitutional without addressing the constitutionality of the incorporation of Kiryas Joel Village, an issue not before this Court. However, *amici* do not concede the constitutionality of Kiryas Joel Village, especially since the record reflects that the boundaries of the Village were drawn in a manner that effectively excluded all non-Hasidics from the Village. *See* "Decision on Sufficiency of Petition," J.A. 8-16.

government . . . cannot endure when there is a fusion between religion and the political regime." *Lee*, 112 S. Ct. at 2667 (Blackmun, J., concurring). Chapter 748 should be held unconstitutional as violating these core principles.

B. Chapter 748 Violates the Establishment Clause By Providing Preferential Treatment for One Religious Group

The law establishing KJVSD, Chapter 748, also violates the Establishment Clause by singling out the Satmar Hasidic community of Kiryas Joel for a special benefit -- its own public school system -- a benefit not shared by any other religious group. Because this law sets up a religious preference, it should be subjected to strict scrutiny analysis. *See Larson v. Valente*, 456 U. S. 228, 246 (1982); *accord, Allegheny*, 492 U.S. at 608-612. While *amici* question whether a law setting up a religious preference can ever satisfy the mandate of the Establishment Clause, *see infra* at 13-14, at a minimum, Chapter 748 is not "closely fitted" to further the asserted governmental interest and must fail. *Larson*, 456 U.S. at 251.

Both the legislative history and circumstances surrounding the law support a finding of religious preference. KJVSD was carved out of a preexisting public school district for the purpose of providing special educational services that were already available through the public schools of Monroe-Woodbury Central School District.¹⁴ Supporters of the law acknowledged that the new school district was for the benefit of the Satmar Hasidic community, with the rationale being to assist Satmar children in receiving services in an environment and under conditions that met with the strictures of

¹⁴ *Amici* do not here assert that Chapter 748 fails the secular purpose component of the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). As discussed in Part III-A, *infra*, *amici* believe that the decision of the court below can be affirmed without direct reference to the three-part *Lemon* test. In particular, *amici* assert that the Court can find that Chapter 748's purpose was to confer a special benefit on the Kiryas Joel Satmar Hasidic community without having to determine that the law was motivated by improper religious purpose under *Lemon*.

their religious faith. Writing Governor Cuomo to encourage him to sign Chapter 748, Assemblyman Lentol argued that the bill was necessary because "[t]he hasidic jewish community hold[s] firmly to its religious tenets." J.A. 19. *See also* Letter of Assemblyman Silver at J.A. 38-39 (Chapter 748 provides "a mechanism through which [Satmar] students will not have to sacrifice their religious traditions in order to receive services."). In signing Chapter 748 into law, Governor Cuomo acknowledged that the State was creating a school district for a village "whose population are all members of the same religious sect." J.A. 40-41. No other religious community has received such preferential treatment.

As this Court declared in *Larson*, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." 456 U.S. at 244. Legislative preferences conflict at the most basic level with the notion of governmental neutrality and equality of religion, a principle that has been the touchstone of Establishment Clause jurisprudence since *Everson*, 330 U.S. at 15 (government cannot "pass laws which aid one religion . . . or prefer one religion over another."). *Accord*, *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("The [Establishment] Clause was designed to stop the . . . Government from asserting a preference for one religious denomination or sect over others."); *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring) ("true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion."); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("government must be neutral when it comes to competition between sects."). *Cf. Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. ---, 113 S. Ct. 2217 (1993).¹⁵ The selective imposition of special benefits and burdens through religious preferences indicates governmental favoritism while it produces religious inequality, a matter of great concern to the

¹⁵ As *Hialeah* makes clear, government efforts to benefit religion generally or particular religions are to be judged under the Establishment Clause. 113 S. Ct. at 2226.

Framers.¹⁶ Religious preferences also raise the "risk of politicizing religion" and "religious gerrymandering" as sects compete in legislative halls for similar advantages. *Larson*, 456 U.S. at 252-255; *Walz v. Tax Commission*, 397 U.S. 664, 695 (1970). As is indicated in the earlier litigation and newspaper accounts, the special treatment awarded the Satmar Hasidic community has spawned political and religious dissension. See *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1238 (2d Cir. 1986); *Waldman v. United Talmudical Academy*, 147 Misc. 2d 529, 558 N.Y.S.2d 781 (Sup. 1990); see also sources cited *supra* n.3.

Because religious preferences violate religious neutrality and equality at a fundamental level, the Court should hold that Chapter 748 is *per se* unconstitutional without engaging in a balancing of interests. Legislation purposefully setting up a religious preference -- a situation even more troubling under our system of rights than the general advancement of religion by government -- should not be subject to a lesser constitutional standard under which government interests might trump rights. As Justice Jackson opined in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943):

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

The dangers appurtenant to explicit legislative religious preferences are so great that they should be struck down *ab initio*.

¹⁶ That the Framers were opposed at a minimum to religious preferences cannot be gainsaid. In his *Memorial and Remonstrance* in opposition to the proposed "Bill establishing a provision for Teachers of the Christian Religion," James Madison argued that "the Bill violates equality by subjecting some to peculiar burdens . . . [and] by granting to others peculiar exemptions." R. Alley, *supra*, at 57.

Traditional application of strict scrutiny analysis also requires that Chapter 748 be struck down. As the Court reaffirmed in *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987), "*Larson* indicates that laws discriminating among religions are subject to strict scrutiny." *Accord, Allegheny*, 492 U.S. at 608-609. Although Chapter 748 does not expressly discriminate against any religion, it is directed at one particular sect only and falls within the ambit of *Larson* which also was directed at "a state law granting a denominational preference." 456 U.S. at 246.¹⁷ Indeed, this case is more compelling than *Larson* for application of strict scrutiny in that *Larson* involved only *de facto* sect discrimination (which the Court held was motivated by covert hostility to the Unification Church). *Id.* Moreover, because Chapter 748 provides the special benefit of a separate school district only to the Kiryas Joel Satmar Hasidic community, it cannot be considered a general government program "that neutrally provide[s] benefits to a broad class of citizens defined without reference to religion." *Zobrest v. Catalina Foothills School District*, 509 U.S. ---, 113 S. Ct. 2462, 2466 (1993). Instead, this law is more akin to the ordinances struck down last term in *Hialeah*, *supra*.

Amici are in basic agreement with the analysis of Chief Judge Kaye's concurrence below which held that even if the delivery of special educational services to the Satmar Hasidic children constitutes a compelling state interest, Chapter 748 is not narrowly tailored to achieve that end. The creation of a separate school district vested with "all the powers and duties of a union free school district" was unnecessary to meet the children's special education needs, *see* Legislative Bill Jacket, R. 698-701, especially in light of the fact that the services were being provided by the Monroe-Woodbury Central School District and, that at the time

¹⁷ Cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)(rejecting arguments that "the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process" or merely because the legislation in question benefits a minority group.).

KJVSD was established, only 13 children were eligible to receive full-time services. J.A. 81 ¶ 16.

Amici contend that alternatives exist for delivering special educational services under the auspices of the Monroe-Woodbury Central School District, possibly through the mechanism of a neutral site chosen on the basis of legitimate secular factors. *Wolman v. Walter*, 433 U.S. 229, 247-248 (1977). KJVSD was created, and the present conflict has come before this Court, in large measure because of the intransigence of both the Kiryas Joel community and the Monroe-Woodbury Central School District. The Court of Appeals in *Board of Education v. Wieder* did not rule that every alternative mechanism, including all neutral sites, would be constitutionally infirm. Instead, the court surmised that "[i]t might well be that certain of the services in controversy could be furnished to [the Satmar Hasidic children] at neutral sites if [the Board] determined to do so." 72 N.Y.2d at 189, n.3. Because *Wolman v. Walter* allows for the provision of educational services at a neutral site, the creation of KJVSD was not a constitutionally permissible solution to address this "intractable problem." J.A. 40; 433 U.S. at 247-248.¹⁸

Moreover, provision of educational services at a neutral site would resolve the sect preference problem inherent in Chapter 748; under a *Wolman* approved arrangement, all religious communities would receive the same benefit of having their disabled children educated. However, the New York Legislature, by going far beyond what was necessary to solve the problem of delivering services to the Satmar Hasidic children, crossed the line separating an arguably appropriate response from an unconstitutional joint venture. Consequently, at a minimum, the action of the New York Legislature creating KJVSD was excessive and, in light of the

¹⁸ As such, it is unnecessary for this Court to consider whether *Aguilar v. Felton*, 473 U.S. 402 (1985), and *Grand Rapids* are still good law. See Brief *Amicus Curiae* of the United States Catholic Conference in Support of Petitioners, at 20-29.

countervailing constitutional considerations, was not narrowly tailored to meet the State's interest.

II. CHAPTER 748 DOES NOT REPRESENT A PERMISSIBLE ACCOMMODATION OF A RELIGIOUS PRACTICE

Petitioners and supporting *amici* contend that Chapter 748 satisfies the Establishment Clause because the law merely represents a permissible accommodation of "the needs of a community of devoutly religious people." KJVSD Brief at 40.¹⁹ The undersigned *amici* vigorously disagree. As a threshold matter, permissible accommodation is an inappropriate theory for supporting Chapter 748 because the Satmar Hasidic community of Kiryas Joel has not asserted a religious claim in defense of its school district. As the KJVSD Brief asserts in its Statement of the Case:

The plaintiffs have argued throughout this litigation that the Satmar faith includes "separatist tenets" requiring that its adherents not mix with persons of other faiths. The record does not support this contention, and it is wrong as a matter of fact. While we have never disputed that the Satmar prefer to live together, they do so to facilitate individual religious observance and maintain social, cultural and religious values, not because it is "against their religion" to interact with others.

KJVSD Brief, at 4, n.1; *accord Wieder*, 72 N.Y.2d at 180, n.2. Petitioner's repeated insistence that New York did not create KJVSD in order to meet a religious need removes this case from the

¹⁹ While all of the briefs on behalf of Petitioners raise this claim in one form or another, the most comprehensive argument in behalf of accommodation is found in the *amicus* brief of the Christian Legal Society *et al.*, coauthored by Professor Michael W. McConnell, the leading advocate of an expanded view of religious accommodation. See *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1; *Accommodation of Religion: An Update and a Response to Critics*, 60 Geo. Wash. L. Rev. 685 (1992).

ambit of a religious accommodation case. See *Employment Division v. Smith*, 494 U.S. 872, 890 (1990)(affirming government authority to provide "nondiscriminatory religious-practice exemptions."); *Texas Monthly v. Bullock*, 489 U.S. 1, 18 (1989)(accommodation claims must be rooted in a showing that government activity "offend[s] . . . religious beliefs or inhibit[s] religious activity.").²⁰ On this ground alone, the claim of accommodation must fail.

Assuming, however, that religion is at the heart of the Satmar Hasidic practice of separatism, R. 452; 464; 495 ¶ 16,²¹ and, at a minimum, that the separate school district was created in response to this religious practice and custom, R. 249, 481-482, Chapter 748 represents an impermissible form of religious accommodation. As an initial matter, the Petitioners concede that the type of accommodation asserted here does not rest on a claimed free exercise violation and thus does not fall within the realm of constitutionally compelled or mandatory religious accommodations. KJVSD Brief at 42.²² As a result, to be constitutional, Chapter 748 must fit within the narrow category of permissible accommodations

²⁰ "[I]n order to perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden on the exercise of religion that can be said to be lifted by the government action." *Amos*, 483 U.S. at 348 (O'Connor, J., concurring).

²¹ While the separatism of the Satmar Hasidic community may not rise to the level of a recognized tenet, the practice appears to have its basis in Satmar religious traditions. As the Appellate Division below noted: "The record, however, contains uncontradicted evidence of a direct link between the language, lifestyle and environment of the community's children and the religious tenets, practices and beliefs of the community." 187 A.D.2d at 23. *Accord*, *Quinones*, 803 F.2d at 1237 ("In general, the Hasidic faith stresses a strict separation between Hasidim and the rest of society.").

²² The availability of mandatory religious accommodations has been severely curtailed as a result of the Court's decision in *Employment Division v. Smith*, 494 U.S. at 884-885. Because Petitioner KJVSD does not assert a free exercise-based accommodation, it is unnecessary for the Court to consider the effect of the recently enacted Religious Freedom Restoration Act. Pub. L. No. 103-141 (1993).

that are neither mandated by the Free Exercise Clause nor forbidden by the Establishment Clause. *Texas Monthly*, 489 U.S. at 18, n.8; *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-145 (1987).²³

Chapter 748 fails to come within this category as defined by the Court. Chapter 748 is quite unlike the accommodation upheld in *Amos*, which involved statutory relief for religious organizations and individuals from the burden of regulation. The accommodation upheld in *Amos* was applicable to all religions, lifted a government-imposed burden, and was arguably required by the Free Exercise Clause. 483 U.S. at 335. Chapter 748 meets none of these criteria. It is sect specific, lifts (at most) a burden imposed by the private conduct of insensitive non-Hasidic school children, and is not required by the Free Exercise Clause. See Lupu, *The Lingering Death of Separationism*, 62 Geo. Wash. L. Rev. 230, 271 (1994). Because this case does not involve an attempt to alleviate a government-imposed burden, the formula advanced in the Brief *Amicus Curiae* of the Christian Legal Society, *et al.*, at 9-25, should be rejected. A rule that would allow government to advance religion to the extent that the aid does not impose "substantial burdens on non-beneficiaries" would turn Establishment Clause jurisprudence on its head. *Id.* at 3.

In addition, unlike the accommodation approved in *Amos*, the law provides an *affirmative* benefit in the form of a state-financed and fully operational school district. As such, Chapter 748 is also distinguishable from *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the Constitution requires an exemption from state compulsory attendance laws), and the *Sherbert*-line of unemployment compensation cases which merely provided that Sabbath observance could not be excluded as grounds for a "good cause" exemption under the law. *Sherbert v. Verner*, 374 U.S. 398, 409 (1962) ("the extension of unemployment benefits to Sabbatarians

²³ See Lupu, *The Trouble with Accommodation*, 60 Geo. Wash. L. Rev. 743, 749-754 (1992) (distinguishing between types of accommodations of religion).

. . . reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent the involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."); *accord Hobbie*, 480 U.S. at 145.²⁴ In stark contrast to these forms of accommodation, Chapter 748 does not simply allow the Satmar Hasidic community to be "left alone," *see Yoder, supra*, but provides an affirmative government benefit not bestowed upon any other religious group. *Cf. Bollenbach v. Monroe-Woodbury Cent. Sch. Dist.*, 659 F. Supp. 1450, 1469, n.26 (S.D.N.Y. 1987).

Finally, the preferential nature of Chapter 748 also removes this case from the realm of permissible accommodations. It is axiomatic that a permissible accommodation of religion cannot be provided to one group only. In *Amos*, the Court distinguished Section 702 of the Civil Rights Act from the Minnesota statute in *Larson* on the ground that Section 702 afforded "a uniform benefit to all religions." 483 U.S. at 339 (internal quotations omitted). Similarly, the Connecticut statute at issue in *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985), failed because it afforded Sabbath observers an absolute and unqualified right to a day off not shared by other believers and nonbelievers.²⁵ *Accord, Hobbie*, 480 U.S. at 145, n.11 (noting how the statute in *Thornton* "single[d] out a particular class of . . . persons for favorable treatment" and had

²⁴ In *Bowen v. Roy*, 476 U.S. 693, 708 (1986), Chief Justice Burger explained that the issue in *Sherbert* and *Thomas v. Review Board*, 450 U.S. 707 (1981), concerned the "good cause" mechanisms for individualized exemptions. "If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests discriminatory intent." *Accord, Hobbie*, 480 U.S. at 142, n.7.

²⁵ Under this analysis, Justice O'Connor's concurrence in *Thornton*, with its focus on the discriminatory effect of the law, is more apposite than the Court's opinion in that case. *Id.* at 712 (O'Connor, J., concurring) ("The statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees.").

"the effect of implicitly endorsing a particular religious belief."). Like the statute in *Thornton*, Chapter 748 awards a particular benefit to the Kiryas Joel Satmar Hasidic community that is not shared by any other religious group or community.²⁶

Compared to the applicable precedent, the instant law cannot be seen as providing a permissible accommodation of the religious beliefs and customs of the Satmar Hasidic community. Instead, Chapter 748 provides a religious preference, forbidden by the Court in *Larson*. As the Court recently reaffirmed in *Lee*, "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee*, 112 S. Ct. at 2655.

III. THE COURT SHOULD DECLINE INVITATION TO OVERRIDE THE TEST ENUNCIATED IN *LEMON V.* *KURTZMAN*

A. It is Unnecessary for the Court to Reconsider *Lemon* Because this Case Can Be Resolved Without Direct Reference to the Three-Part Test

Two of the Petitioners and a plethora of supporting *amici* are asking the Court to revisit and discard its analytical framework enunciated in *Lemon v. Kurtzman*, commonly called the "*Lemon* test," 403 U.S. at 602-603, and to subscribe to a new standard that would allow for greater government sponsorship of and involvement in religious affairs. This course has been urged upon the Court before, most recently in *Lee v. Weisman*. The Court declined to reconsider *Lemon* in that case and in *Lamb's Chapel v. Center Moriches School District*, 508 U.S. ---, 113 S. Ct. 2141 (1993), last

²⁶ In a like manner, the release-time provision upheld in *Zorach v. Clauson*, *supra*, was open to all religious sects desiring to provide religious instruction for school children. Nonetheless, even Professor McConnell has expressed doubts about certain aspects of that decision. See 60 Geo. Wash. L. Rev. 685, 705 n.81.

term, and *amici* see no reason for this body to venture down that road in the present case.

The course urged by Petitioners and supporting *amici* is both unnecessary and unwise. As the undersigned *amici* have demonstrated above, *see* Parts I and II, *ante*, the decision of the Court of Appeals can be affirmed without reliance on the three-part test enunciated in *Lemon*. By carving out a separate public school district that is coterminous with and controlled by an insular religious community, Chapter 748 violates core principles of nonestablishment. Chapter 748 is also unconstitutional because it establishes a religious preference, thus violating notions of neutrality and equality.

As a result, reliance here on the *Lemon* test is unnecessary. That this case can be resolved by utilizing other theories is, of course, in accord with the Court's "unwillingness to be confined to any single test or criterion," *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984), and its oft repeated declaration that the *Lemon* prongs "are no more than helpful signposts." *Hunt v. McNair*, 413 U.S. 734, 741 (1973); *accord*, *Meek v. Pittenger*, 421 U.S. 349, 359 (1975) ("*Lemon* does not set precise limits but serves only as guidelines."). Because it is unnecessary to apply *Lemon* in order to resolve this case, there is no reason for the Court to "reconsider" *Lemon*. The effort to overturn *Lemon* represents an unnecessary distraction for the Court.

In any event, the Court should exercise judicial restraint and decline to reconsider the three-part test. First, for reasons discussed *infra*, the Court should avoid overruling "the sensible core of the *Lemon* test, and the whole line of pre-*Lemon* cases requiring government neutrality toward religion." Laycock, '*Noncoercive*' Support for Religion: Another False Claim About the Establishment Clause, 26 Val. Univ. L. Rev. 37, 53 (1991). Because *Lemon* represents "the cumulative criteria" developed by the Court over the years, *Lemon*, 403 U.S. at 612, its invalidation would effect "a wholesale overturning of settled law concerning the Religion

Clauses of our Constitution." *Employment Division v. Smith*, 494 U.S. at 908 (Blackmun, J., dissenting).²⁷

Moreover, notions of *stare decisis* instruct the Court to refrain from reversing settled law, especially when such action is unnecessary. The Chief Justice has expressed the importance of this doctrine in the following terms:

The rule of law depends in large part on adherence to the doctrine of *stare decisis*. Indeed, the doctrine is a natural evolution from the very nature of our institutions.

Welch v. Texas Dept. of Highways and Pub. Transport., 483 U.S. 468, 478-479 (1987)(internal quotation omitted). Under normal circumstances "departure from the doctrine of *stare decisis* demands special justification," factors not present in the instant case. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). But the argument favoring adherence to *stare decisis* and against overturning *Lemon* is even stronger here because, as noted above, the Court has expressly turned back such requests in the previous two terms. If the principle of *stare decisis* means anything, it is that the perennial review of settled case law should be avoided. Because more than thirty years of Establishment Clause jurisprudence are intertwined with the *Lemon* standard, the Court should decline to overrule *Lemon*.

B. The Principles Represented in the *Lemon* Test Have Their Basis in Long-Standing Notions of Neutrality and Equality

Even assuming that a reconsideration of *Lemon* is appropriate, the Court should decline to overrule the three-part test.

²⁷ "[B]efore overruling an entire jurisprudence wholesale, it is advisable to inquire into both the social effects inherent in such a displacement and the jurisprudential need for it." Marshall, *Unprecedented Analysis and Original Intent*, 27 Wm. & Mary L. Rev. 925, 926 (1986).

Lemon is much more than a "tidy formula[]" the Court devised to frustrate judges, challenge lawyers and perplex law students. See *Wallace v. Jaffree*, 472 U.S. at 89 (Burger, C.J., dissenting). Instead, *Lemon* is "a convenient formulation of the 'cumulative criteria developed by the Court over many years,'" and is but "an elaboration of the fundamental rule that government be neutral with respect to religion." Laycock, 'Noncoercive' Support for Religion, at 53-54 (quoting *Lemon*, 403 U.S. at 612); accord, *Waltz*, 397 U.S. at 669; *Schempp*, 374 U.S. at 222 (the Court's Establishment Clause cases speak of "wholesome neutrality."). Even though the first two parts of the test were enunciated in *Schempp*, its roots are much older and deeper. Notions of neutrality and equality are found in the Court's earliest religion decisions. See *Everson*, 330 U.S. at 18; *Watson*, 13 Wall. at 728. Central to ensuring neutrality and equal treatment of religions are the prohibitions against government financial support, sponsorship, preference, and active involvement in religious activities. *Waltz*, 397 U.S. at 668. Whether these commands are represented through terms such as "secular purpose," "primary effect," "excessive entanglement," or some other phrase, "the essential principle remains the same." *Allegheny*, 492 U.S. at 593.²⁸

One such formulation of these principles is Justice O'Connor's endorsement test, which "captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'" *Id.* at 627 (O'Connor, J., concurring)(quoting *Wallace*, 472 U.S. at 70). As Justice Blackmun remarked in *Allegheny*, the history of this nation regrettably contains too many examples of official endorsement and promotion of religion, in most instances the promotion of Protestant Christianity to the detriment of Catholics

²⁸ "*Lemon's* 'purpose' requirement aims at preventing the relevant decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335.

and Jews. *Allegheny*, 492 U.S. at 604.²⁹ Fortunately, the religious favoritism expressed in the maxim "this is a Christian nation" has been conclusively rejected by the Court. *Lee*, 112 S. Ct. at 2683 (Scalia, J., dissenting); see *Church of the Holy Trinity v. United States*, 143 U.S. 457, 472 (1892). Such declarations by any arm of government have no place in our religiously diverse society and "no place in the jurisprudence of the Establishment Clause." *Allegheny*, 492 U.S. at 605.³⁰ This history reminds us, however, of the evils of religious favoritism, preference, and support, evils the Establishment Clause "was designed forever to suppress." *Everson* 330 U.S. at 15.

As a result, if this Court chooses to apply the *Lemon* test to the instant case, it should find that Chapter 748 violates the Establishment Clause. As the Court of Appeals held below, Chapter 748 sets up a symbolic union of church and state, thereby creating the perception the State supports and endorses the religious practices of the Satmar Hasidic community. *Grand Rapids*, 473 U.S. at 389. Because Chapter 748 affords a unique, ongoing benefit to the Satmar Hasidic community, instead of simply alleviating a governmental burden, the governmental imprimatur of Satmar Hasidim is overwhelming.

Amici in support of Petitioners argue that *Lemon* should be discarded, alleging that the Court's Establishment Clause decisions

²⁹ During the antebellum period, courts periodically employed the Christian nation maxim to justify the imposition of legally sanctioned religious disabilities. See *People v. Ruggles*, 8 Johns. 290 (N.Y. 1811)(blasphemy); *Commonwealth v. Wolf*, 3 Serg. & Rawle 48 (Pa. 1817)(Sabbath breaking); *Updegraph v. Pennsylvania*, 11 Serg. & Rawle 394 (Pa. 1822)(blasphemy); *Atwood v. Welton*, 7 Conn. 66 (1828)(qualification for oaths taking); *Kilgour v. Miles*, 6 Gill & J. 274 (Md. 1834)(Sabbath breaking); *Charleston v. Benjamin*, 2 Strob. 508 (S.C. 1848)(Sabbath breaking).

³⁰ "This Court . . . squarely has rejected the proposition that the Establishment Clause is to be interpreted in light of any favoritism for Christianity that may have existed among the Founders of the Republic." *Id.* at 605, n.55.

evinced a level of hostility toward religion.³¹ This claim is shortsighted and reveals a fundamental misunderstanding of the Court's holdings in this area. Such claims have been addressed and rejected by the Court on numerous occasions. *See, e.g., Lee*, 112 S. Ct. at 2661 (the Court's decisions express "no hostility" to the concept of prayer); *Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring)(neither the endorsement test nor its application . . . reflects "an unjustified hostility toward religion."); *Edwards v. Aguillard*, 482 U.S. 578, 606-608 (1987) (Powell, J., concurring)("the Court has properly noted" the "role of religion in American life."); *Schempp*, 374 U.S. at 225-226 (State may not "affirmatively oppos[e] or show[] hostility to religion."); *McCullum*, 333 U.S. at 211 (refusal to allow public schools to be used for the dissemination of religious doctrines does not "manifest a government hostility to religion or religious teachings."). That the Court's decisions fail to support a claim of hostility is also borne out through the holdings in *Lamb's Chapel*, *supra*; *Zobrest*, *supra*; *Board of Education v. Mergens*, 496 U.S. 226 (1990); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Amos*, *supra*; and *Zorach*, *supra*. Counter to allegations of a religious animus, the principles represented in *Lemon* guarantee the independence and vitality of religion by ensuring that there will never be a "state-created orthodoxy." *Lee*, 112 S. Ct. at 2658. These decisions are to the advantage of religion because, as Justice Brennan wrote in *Schempp*:

It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply

³¹ See Brief of the Southern Baptist Convention Christian Life Commission as *Amicus Curiae* Supporting Petitioners, at 11-12; Brief of *Amicus Curiae* The Archdiocese of New York in Support of Petitioner, at 6-7.

involved with and dependent upon the government. 374 U.S. at 259 (Brennan, J., concurring).³²

Petitioner *amici's* objections, in essence, are not to the *Lemon* test but to the whole history of Establishment Clause jurisprudence and its embrace of the notion of neutrality. See Brief of Institute for Religion and Polity, at 3-10; Brief for COPLA, at 11-12. *Amici* apparently desire a society in which government shoulders the affirmative obligation to promote religion and align its policies to prevailing religious sentiment. But the Constitution mandates that "the government remain secular, rather than affiliate itself with religious beliefs or institutions. . . . A secular state, it must be remembered, is not the same as an atheistic or antireligious state." *Allegheny*, 492 U.S. at 610.

At the center of *amici's* complaints rests the premise that the controlling, if not sole purpose of the Establishment Clause is to protect and enhance religious liberty. Brief of the Southern Baptist Convention, at 7; Brief of COPLA, at 5.³³ Although ensuring religious liberty surely is an important component of nonestablishment, that impulse does not define or subsume the clause. The Court has long recognized that "the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of

³² James Madison recognized one hundred and seventy-five years ago that "the number, the industry, and the morality of the Priesthood, and the devotion of the people have been manifestly increased by the total separation of the Church from the State." Letter to Robert Walsh, March 2, 1819, in R. Alley, *James Madison on Religious Liberty* at 81.

³³ A leading proponent of this view is Rev. Richard John Neuhaus, who has recently written that "[t]he first thing to be said about the first liberty is that liberty is the end, the goal, and the entire rationale of what the First Amendment says about religion. . . . The establishment part of the Religion Clause is entirely, and without remainder, in the service of free exercise. Free exercise is the end; proscribing establishment is a necessary means to an end." Neuhaus, *A New Order of Religious Freedom*, 60 Geo. Wash. L. Rev. 620, 626-627 (1992).

government and religion tends to destroy government and to degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Nonestablishment also guarantees religious equality,³⁴ protects the civil state from the encroachments of religion,³⁵ and ensures the legitimacy and institutional integrity of both religion and government.³⁶ Concerns for equality, neutrality and integrity are not answered by an Establishment Clause that has as its sole purpose the mere protection of religious exercise.

As an alternative to *Lemon*, Petitioner KJVSD and supporting *amici* urge this Court to adopt a standard that only prohibits government from coercing religious belief or engaging in proselytizing activity. The undersigned *amici* urge the Court to once again reject this alternative. See *Allegheny*, 492 U.S. at 602-609. While noncoercion and nonproselytization represent important

³⁴ "The prohibition on laws respecting establishment is primarily an equal liberty provision; only secondarily is it concerned with religious liberty in a noncomparative sense." Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 Univ. Pa. L. Rev. 555, 568 (1991).

³⁵ Madison warned against "the danger of encroachments by Ecclesiastical Bodies" on democratic society:

"What influence in fact have ecclesiastical establishments had on civil society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen as the guardians of the liberties of the people."

"Detached Memoranda," in Alley, *supra*, at 58. Madison also argued that ecclesiastical establishments threatened the "purity and efficacy of Religion" and "Civil Government." *Memorial and Remonstrance*, *id.*, at 90.

³⁶ According to Professor Lupu, "the identification of a church with state power reduces the dissonance between the claims of religion and those of nationalism. A church with such a link benefits from a reduction of competing loyalties, which might otherwise make the church less appealing to the populace." Lupu, *Reconstructing the Establishment Clause*, at 569.

impulses in Establishment Clause jurisprudence, *see Lee*, 112 S. Ct. at 2655; *Everson*, 330 U.S. at 15-16, the Court has never required proof of government coercion or proselytization as a necessary element for an Establishment Clause violation. To the contrary, the overwhelming number of the Court's prior decisions affirms the exact opposite to be true:

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by an enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

Everson, 370 U.S. at 430.³⁷ Limiting the scope of the Establishment Clause to instances where government has actually coerced religious belief or engaged in proselytizing would "gut the core" of the clause and abdicate its role as the preserver of religious neutrality and equality. *Allegheny*, 492 U.S. at 604. According to Professor Laycock, the adoption of a coercion standard would mean that "government need not be neutral between religion and nonreligion, and it need not be neutral among competing religions." Government could then "endorse generic theism, generic Protestantism, Roman Catholicism, Seventh-Day Adventism, or Twelfth Street Pentecostal Holiness Church. Congress could charter The Church of the United States, so long as it did not coerce anyone to join." Laycock, 'Noncoercive' Support for Religion, at 39; *see also*, Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 Univ. Pa. L. Rev. 555, 579 (1991)(under a coercion standard, "government could

³⁷ The following Court decisions have rejected coercion as a necessary element for an Establishment Clause violation, either expressly or by implication. *Allegheny*, 492 U.S. at 627-628; *Wallace*, 472 U.S. at 61; *Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir.), *aff'd mem.*, 455 U.S. 913 (1982); *Stone v. Graham*, 449 U.S. 39, 42 (1980); *PEARL v. Nyquist*, 413 U.S. 756, 786 (1973); *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968); *Schempp*, 374 U.S. at 223; *Engel*, 370 U.S. at 430; *McGowan*, 366 U.S. at 444, n.18; *Zorach*, 343 U.S. at 311-312; *McCullum*, 333 U.S. at 209.

create significant incentives to join a sect, and thereby manipulate religious allegiances in ways highly analogous to the psychic pressure generated by an established church."'). As Justice O'Connor observed in *Allegheny*:

An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization [citations omitted] but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community.

492 U.S. at 627-628 (O'Connor, J., concurring). The collapse of the Establishment Clause into a coercion/proselytizing prohibition would turn the clause into a mere mirror of the Free Exercise Clause, a violation of which already depends upon a showing of government compulsion. *Engel*, 370 U.S. at 430; *Schempp*, 374 U.S. at 222-223.³⁸

Such a construction is inconsistent with the understanding that the Establishment Clause has a meaning and purpose apart from the Free Exercise Clause. See discussion *ante*; Lupu, *Reconstructing the Establishment Clause*, at 576-577 ("An interpretation of nonestablishment that renders it redundant cannot capture its meaning, original or otherwise, and should be avoided on general principles of constitutional construction."). Because a coercion/proselytizing standard fails to respond to "the myriad, subtle ways in which Establishment Clause values can be eroded,"

³⁸ According to Professor Carl Esbeck, "[r]educing the establishment clause to the prevention of coercion of religiously based conscience renders the clause's reach coextensive with that of the free exercise clause." Esbeck, *The Lemon Test: Should It Be Retained, Reformulated or Rejected?*, 4 Notre Dame J. Law, Ethics & Pub. Policy 513, 544 (1990).

Wallace, 472 U.S. at 61, it should be rejected as a viable alternate standard for Establishment Clause adjudication.

CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed.

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APPENDIX

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national nonprofit, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has participated either as a party or as *amicus* in many of the leading church and state cases decided by this court. Americans United is composed of approximately 50,000 members nationwide and maintains active chapters in several states. Americans United members adhere to various religious faiths, with some holding no religious affiliation. They are united, however, in their commitment to the long-standing American principle of church-state separation. Americans United members sincerely believe that the creation of the Kiryas Joel Village School District violates core notions of church-state separation.

The American Jewish Committee

The American Jewish Committee (AJC), a national organization of approximately 50,000 members, was[®] founded in 1906 to protect the civil and religious rights of Jews. AJC has always strongly supported the constitutional principle of separation of religion and government embodied in the Establishment Clause of the First Amendment. This principle, we believe, has been the cornerstone of religious liberty for all in America. Accordingly, we believe that it is not a proper function of government to establish a separate school district to be under the control of any religious faith. This is why we join in the submission of the brief in this case, as we have in numerous earlier cases relating to the principle of separation.

Anti-Defamation League

The Anti-Defamation League (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion. In support of this principle, ADL has previously filed *amicus* briefs in such cases as *Lee v. Weisman*, 505 U.S. ___ (1992); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986); *Grand Rapids v. Ball*, 473 U.S. 363 (1985); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and *Abington v. Schempp*, 374 U.S. 203 (1963). ADL is able to bring to the issues raised in this case the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

Americans Civil Liberties Union

The Americans Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles embodied in the Bill of Rights, including the separation of church and state. The New York Civil Liberties Union (NYCLU) is one of its statewide affiliates. The ACLU and its affiliates have litigated many important church-state cases before this Court under both the Free Exercise Clause, *see, e.g., Church of the Lukumi Babulu Aye v. Hialeah*, 508 U.S. ---, (1993), and the Establishment Clause *see, e.g., Lee v. Weisman*, 505 U.S. ___ (1992). This case once again raises important issues about the relationship between church and state in our constitutional system. Accordingly, the proper resolution of this case is a matter of central concern to the ACLU and its members.

National Council of Jewish Women

The National Council of Jewish Women (NCJW), Inc. is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. We join this brief because of NCJW's belief that religious liberty and the separation of church and state are constitutional principles which must be preserved in a democratic society.

Unitarian Universalist Association

The Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States, Canada and elsewhere. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purpose. In particular, the Association has adopted numerous resolutions affirming the principles of separation of church and state and personal religious freedom.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL
VILLAGE SCHOOL DISTRICT, ET AL.,

Petitioners,

v.

LOUIS GRUMET AND ALBERT HAWK,

Respondents.

On Writ of Certiorari To The
New York Court of Appeals

**BRIEF OF THE COMMITTEE
FOR THE WELL-BEING OF KIRYAS JOEL
AS AMICUS CURIAE SUPPORTING RESPONDENTS**

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No. 93-517, 93-527, 93-539

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**BRIEF OF THE COMMITTEE
FOR THE WELL-BEING OF KIRYAS JOEL
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RESPONDENTS**

**INTRODUCTION
AND INTEREST OF AMICUS CURIAE**

This brief is submitted on behalf of the Committee for the Well-Being of Kiryas Joel, which represents over 500 members of the Satmar Jewish community of Kiryas Joel who support the decision below.

This case requires this Court to determine whether the Establishment Clause of the First Amendment to the United States Constitution was violated when the state of New York

created a school district to accommodate the desires of Hasidic parents to educate their handicapped children in an insular community under Rabbinical authority. The court below ruled that the law violated the Establishment Clause on its face. *Grumet et. al. v. Board of Education of the Kiryas Joel Village School District*, 81 N.Y.2d 518 (1993). In striking down the state law as unconstitutional, the New York Court of Appeals affirmed two lower court decisions.

Amici believes the facts and circumstances of this case fall squarely within the unconstitutional prohibitions delineated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and its progeny. In particular, examining the school district's operation and the hegemony of the community's religious leadership compels the conclusion that all three *Lemon* prongs render the law unconstitutional.

The Committee for the Well-Being of Kiryas Joel includes over 500 Satmar religious members who reside in Kiryas Joel and strongly observe orthodox Hasidic Jewish laws. They are critical of the Kiryas Joel leadership. The committee is headed by Joseph Waldman, an unsuccessful candidate for the Kiryas Joel School Board who received 673 votes in the district's first election. Waldman is a fifth-generation "Satmar" member who has suffered significant hardship and harassment for his dissident activities.

The Committee firmly believes in respecting Jewish orthodox traditions including those concerning the education of school-age Hasidic Jews, who are required by Jewish law to learn the Torah and Jewish principles through belief in G-d in a religious and talmudical fashion. The Committee also believes in this country's historic commitment toward strengthened religious freedoms as expressed by the Free Exercise and Establishment Clauses of the United States Constitution.

In addition, the Committee believes in preserving the authority of the religious leadership through their Rabbis and the Jewish authorities. However, the Committee opposes the authority of Rabbis and unelected leaders who keep themselves above the Torah, who disrespect their own religious Jewish laws, and who abuse the power of their leadership to enhance their own agenda and political interests in a brutal manner. Accordingly, this Committee has objected to the way the Kiryas Joel religious leadership has exercised its authority.

By presenting facts showing the law which created the Kiryas Joel School District on its face and as applied violates the Constitution, the Committee remains consistent with its mission: to combine the Jewish religion and its principles with the educational values which the children of Kiryas Joel require without bridging the necessary separation between church and state.

This brief is being filed with the written consent of counsel for petitioners, which consent has been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

Chapter 748 of the Laws of 1989 violates the Establishment Clause because it reflects a religious purpose, has the principal and primary effect of endorsing religion and creates an excessive entanglement between government and religion. *Amici* reaches this conclusion by analyzing the law on its face and as applied to facts unique to the Kiryas Joel Village School District.

FACTS ^{1/}

Incorporated in 1977, the Village of Kiryas Joel is situated within the boundaries of the Town of Monroe, Orange County, New York. Approximately 8,500 ultra-orthodox Hasidic Jews live in the village, including approximately 3,000 school-age children, nearly 200 of whom need special education to accommodate such handicaps as mental retardation, deafness, speech and language disorders, Down's Syndrome, spina bifida and cerebral palsy. *Board of Education of the Monroe-Woodbury School District v. Weider*, 72 N.Y.2d 174, 179 (1988). No non-Hasidic family is permitted to live in the Village of Kiryas Joel. Accordingly, the village is culturally, ethnically and religiously isolated. Yiddish is the principal language. Television, radio and English language newspapers are prohibited. Separation of the sexes is observed in the village and its schools. In addition to a religious dress code for males and females, males wear long side curls, head coverings and special garments and women may not maintain even one natural hair and must cover their heads with scarves or short wigs.

Rabbinical authority over the community

Residents of Kiryas Joel are required to strictly observe the religion only as interpreted through the teachings of Grand Rabbi Moses Teitelbaum ("Grand Rabbi"), the proclaimed leader of the world-wide Satmarer Congregation. (*1) Grand

^{1/} Amici is aware that not all the facts set out here are in the record on appeal. Amici believes that inclusion of these facts is essential for this Court's understanding of the way Rabbinical leadership controls the Kiryas Joel community and how Chapter 748's application violates the Establishment Clause. This brief makes reference to these facts with starred numbers which match the documents amici has lodged with the Court.

Rabbi Teitelbaum's son, Rabbi Aaron Teitelbaum ("Rabbi"), the spiritual and religious leader of Kiryas Joel, has described the role of religion in the community:

It is the essence of being a Satmar that they adhere to the religious principles, teachings, and orders of their Rabbi. An individual who fails to adhere to the tenets of the Rabbi is no longer following the principles established by the Satmar. There is an inherent commitment to devote every aspect of an individual's being to the Rabbi's teaching and directives. (*2)

Rabbinical authority over community affairs extends beyond religious observance. The Rabbi has traditionally ruled over every aspect of Hasidic life, including religion, education and marriage. Record at 407 (hereinafter "R. ____").

More generally, the Rabbi has described his role as follows:

[I]t is my solemn duty to instruct the members of my congregation in the commands of the Torah, and in the traditions and teachings of our forefathers and holy Rabbis. In doing so, it is imperative for me to remind my congregation of the religious duty to revere the established religious authority in our Satmar community, including most particularly the authority of the current Grand Rebbe. (*3)

Rabbinical control over the community also includes the enforcement of exclusionary residential policies.

In May 1989, officials of the congregation and the village announced a policy which prohibited any homeowner or contractor from selling or renting property without the prior written approval of a congregation committee. (*4)

Community officials, including the Grand Rabbi, have also enacted a policy which requires all developers wishing to build housing units in the community to pay the yeshiva \$10,000 per medium sized unit, with increased costs depending on the size. (*5)

The Grand Rabbi announced these exclusionary policies in local and national Jewish newspapers while the State Legislature debated whether to create a public school district in the village. These policies remain in force and effect.

Creation of the Village of Kiryas Joel School District

Until 1990, when the Kiryas Joel school district commenced operation, disabled school-age children residing in Kiryas Joel attended special education classes at the nearby Monroe-Woodbury Central School District ("Monroe Woodbury").

For religious reasons, Kiryas Joel parents became disenchanted with Monroe-Woodbury's educational services and tried to force Monroe-Woodbury to educate Kiryas Joel students in their own schools or at a neutral site. *See, Board of Education of the Monroe-Woodbury Central School District v. Weider*, 72 N.Y. 174, 180, 188 (1988). The New York Court of Appeals rejected the parents' claim. *Id.* at 187. In response, state legislators introduced Assembly Bill 8747 to create a union free school district within the boundaries of the Village of Kiryas Joel to provide special education services to children residing there. This legislation was introduced to resolve the dispute between Kiryas Joel parents and Monroe-

Woodbury. R. 111. In a letter to New York Governor Mario M. Cuomo, urging that he sign the legislation, Sheldon Silver, the bill's co-sponsor in the State Assembly, made the bill's religious purpose clear, "This bill creates a legislative response to (*Weider*) by providing a mechanism through which students will not have to sacrifice their religious traditions in order to receive the services which are available to handicapped students throughout the state." R. 481.

Counsel to the New York State Education Department expressed doubts about the bill's constitutionality and recommended against passage. R. 99-101. Counsel noted that "the State would be accommodating the religious beliefs of a particular religious sect by enacting legislation that furthers its decision to insulate the children of the village from the larger society." R. 101. In addition, the Budget Report on Bills acknowledged that creation of the district "could establish an undesirable precedent whereby other sects or groups could seek a special legislative chapter to create public school districts in cases where such groups have become disenchanted with the education offered in their existing public school district." R. 127.

On July 24, 1989, Governor Cuomo signed Assembly Bill Number 8747 into law, creating the union free school district now under review. R. 111. This law, Chapter 748 of the Laws of 1989 ("Chapter 748"), took effect on July 1, 1990.

The school board electoral process

The law creating the Kiryas Joel school district provided for a Board of Education composed of from five to nine members elected by qualified village voters. *Grumet v. Board of Education*, 81 N.Y.2d 518, 522 n.1 (1993). The village held its first school board elections in January 1990. R. 598. Village resident Joseph Waldman campaigned for a board

position. R. 598. Waldman competed against seven other candidates, each of whom the Grand Rabbi had selected and directed village residents to elect. (*6) The Grand Rabbi objected to Waldman's candidacy. R. 598.

On December 31, 1989, speaking publicly about the elections, the Grand Rabbi stated:

Here, the election will take place... the seven people that the law mandates for us to elect, according to the law. It should be a fair election. It's very important to prevent that no split should appear among us, nothing at all. It's like this. With the power of the Torah, I am here the Authority in the Rabbinical Leadership together with the local Rabbi, of course, as you know, I want to nominate seven people and I want these people to be the people... It's an election, and everyone has to go vote; we understand and we don't hold, by any means that we should put out another ballot. This ballot that I put together, with the Leadership of the community... here, I have it. This are the seven people... I wanted to include another name but since he is not interested... the law is that the person has to be willing.

The Rabbi then listed his candidates for the school board:

The first one is Abraham Weider, then comes Mendel Schwimmer, Mendel Hirsh, Lipa Gross, Moishe Leizer Neiman, Shimon Moishe Kepech and Berel Pollatchek. Six of these people were by me and the seventh

one didn't come. Instead of him I placed Berel Pollatchek. (*6)

On October 8, 1989, through the orders of Rabbis Moses and Aaron Teitelbaum, Waldman was expelled from the congregation in retaliation for his dissident activities. R. 598. Invoking a school by-law which required that parents of students enrolled in the main Kiryas Joel yeshiva belong to the congregation, in March 1990, the Teitelbaums expelled Waldman's six children from the school. R. 597, 598. In reinstating the students, the New York State Supreme Court found the expulsions arbitrary and capricious because congregation authorities submitted no evidentiary basis for the five month delay in their effect (the father had been expelled from the Congregation the prior October and this allegedly terminated the children's right to attend), the children's expulsion preceded the end of the school year by only two months and alternative schooling arrangements were infeasible. *Matter of Waldman v. United Talmudical Academy*, 147 Misc.2d 529 (Orange Co. Sup. Ct. 1990). Thereafter, when he refused to follow Supreme Court's direction, the Rabbi was found to be in contempt of court.

On March 31, 1990, one day after Waldman appeared in court to challenge the school expulsion, several hundred people, including the Rabbi, demonstrated in front of his home, chanting "Death to Joseph Waldman" and broke windows in his home by throwing rocks. R. 608-09. Several days later, Meyer Wertheimer, an associate of the Rabbi's, slammed his car into that of a Waldman supporter, a Rabbi, after the latter left Waldman's home. R. 609. At about the same time, the Rabbi initiated a petition drive against Waldman during which coercion was used to collect signatures. R. 609-10.

Contemporaneous newspaper reports indicate the electoral process violently divided the community as a candidate was threatened, his tires were slashed and charges of "dirty campaign tricks" were levied. R. 470-90.

ARGUMENT

CHAPTER 748 VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BOTH FACIALLY AND AS APPLIED.

The Establishment Clause bars state governments from making laws "respecting an establishment of religion." U.S. Const. Amend. I. *See, Everson v. Board of Education*, 330 U.S. 1 (1947) (Establishment Clause held applicable to the states).

While "total separation (between church and state) is not possible in the absolute sense," the Establishment Clause aims "to prevent, as far as possible, the intrusion of either (the church or the state) into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). This Court has reaffirmed these values in subsequent cases. In *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), writing for the Court, Chief Justice Burger opined:

The purposes of the First Amendment guarantees relating to religion were twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other eighteenth century systems. Religion and government, each insulated from each other, could then coexist. Jefferson's concept of a 'wall' . . . was a

useful figurative illustration to emphasize the concept of separateness. Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, but the concept of a 'wall' of separation is a useful signpost.

Id. at 122-23 (cites omitted).

This Court has consistently applied a three-part test to analyze Establishment Clause matters. To survive such a challenge, "[F]irst, a statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13. See also, *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592 (1989) ("This trilogy of tests has been applied regularly in the Court's later Establishment Clause cases"). This Court reaffirmed *Lemon's* authority last term. See, *Lamb's Chapel v. Center Moriches*, 113 S.Ct. 2141, 2148 n.7 (1993) ("*Lemon*, however frightening it might be to some, has not been overruled").

Chapter 748 violates the Establishment Clause because it violates each prong of the *Lemon* test. Accordingly, the decision of the court below must be affirmed.

(A) No secular purpose justifies the Legislature's creation of the village school district because it stems from the religious order's refusal, on religious grounds, to utilize existing facilities.

A legislative scheme requires a secular purpose. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). "In applying the purpose test, it is appropriate to ask 'whether government's

actual purpose is to endorse or disapprove of religion." *Wallace v. Jaffree*, 472 U.S. 38, 69-70 (1985)(O'Connor, J., concurring), quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). See also, Tribe, *American Constitutional Law* sec. 14-9 at 1205 (2d Ed. 1988) ("[T]he requirement of a secular purpose has perhaps its most basic application in the context of governmental control of activities which some persons wish to undertake for religious reasons").

"The relevant issue is whether an objective observer, acquainted with the text, legislative history and implementation of the statute, would perceive it as a state endorsement." *Id.* at 76. In particular, a statute violates the Establishment Clause where it fuses government and religion and the valid secular purposes it seeks to advance are attainable through other means. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123-24 (1982). Cf., *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) ("a court may invalidate a statute only if it is motivated wholly by an impermissible purpose") (cites omitted).

An objective observer of the legislative process prior to the enactment of Chapter 748 could only conclude that the government intended to endorse the tenets of the Satmarer sect. Although Monroe-Woodbury had provided an adequate education for handicapped Hasidic students, their parents objected to these services on religious grounds. Chapter 748 is unconstitutional because religious-based objections to the secular education already being provided triggered its passage, and the state possessed other means to educate handicapped Hasidic students. *Larkin, supra*.

Before the Kiryas Joel school district was created, "the Monroe-Woodbury school district had offered the village's handicapped students the special services to which they were entitled under federal and state law at the district's public

schools." *Brief for Petitioner Attorney General of the State of New York*, at 4. The court below also concluded that Monroe-Woodbury's educational program satisfied the educational needs of Kiryas Joel students. *Grumet v. Board of Education*, 81 N.Y.2d 518, 531 (1993). "Thus, the only secular need for the statute . . . did not, in fact, exist." *Id.*, at 541 (Hancock, J., concurring).

The State Legislature capitulated to the demands for a school district in Kiryas Joel after parents there objected to existing facilities on religious grounds. Invoking the Free Exercise Clause, the parents opposed, on religious grounds, Monroe-Woodbury's efforts to educate their children. According to the New York Court of Appeals:

Defendant's constitutional 'right' to services in their own schools or at a neutral site, as asserted in this court, rests on their contention that the Board's public school placements interfere with the free exercise of their sincere religious beliefs guaranteed by the State and Federal Constitutions, that compelling the children to attend regular public school classes and programs forces them to choose between following the precepts of their religion and foregoing benefits on the one hand, and accepting benefits while violating their religious beliefs on the other.

Board of Education of the Monroe-Woodbury School District v. Weider, 72 N.Y.2d 174, 188 (1988) (cites omitted).² "That a statute which is clearly intended to meet the special religious requirements of a particular sect is a statute having a religious purpose seems self-evident." *Grumet*, 81 N.Y.2d at 542 (Hancock, J., concurring). Indeed, Chapter 748's co-sponsor made the bill's religious purpose clear upon advocating its passage: "This bill represents a legislative response to (*Weider*) by providing a mechanism *through which students will not have to sacrifice their religious traditions* in order to receive the services which are available to handicapped students throughout the State" (emphasis added). This statement is relevant when determining if the bill reflects a religious purpose. *Wallace v. Jaffree*, 472 U.S. 38, 43, 56-57 (1985) (statute was unconstitutional where the bill's primary sponsor said the bill was motivated by religious considerations).

In *Wallace*, this Court struck down an Alabama law which mandated a period of silence in public schools because the bill lacked a secular purpose. 472 U.S. at 56. Although the law was intended to allow students to meditate or voluntarily pray, this Court concluded that the statute endorsed religion because an existing law allocated a moment of silence in school for students to meditate. *Id.* at 58. The same result is compelled here. Like the existing law which allowed students to meditate in *Wallace*, Kiryas Joel parents had existing means to educate their handicapped children. An objective observer who concludes that religious motivations underscored the subsequent meditation statute in *Wallace* must

² The Court of Appeals did not resolve the parent's Free Exercise claim because it was not raised before the lower courts. *Board of Education of the Monroe-Woodbury School District v. Weider*, 72 N.Y. 174, 188 (1988). This claim is not properly presented here either.

also conclude that religious motivations influenced the creation of a school district in a religious community, particularly after parents there objected, on religious grounds, to existing secular educational services.

This Court's ruling in *Larkin* is instructive. There, the ends sought by a Massachusetts law which granted veto power to churches over liquor license applications for nearby establishments were also attainable through other means, namely by banning liquor establishments outright or ensuring a hearing for the views of affected institutions and according those views great weight. *Id.* at 123-24. While the purported aim of Chapter 748 — to educate disabled children — compares with the desire to "protec[t] spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets," *Larkin*, 459 U.S. at 124, the valid secular purposes which both statutes advance are attainable through other means. Because Chapter 748 also unconstitutionally fuses governmental and religious functions, *see*, sec. (3) (C) (1), *ante*, it reflects an unconstitutional purpose. *Id.*

(B) The principal and primary effect of the creation of the village district improperly endorses religion.

A legislative scheme violates the Establishment Clause where its principal or primary effect is to advance religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). A governmental practice advances religion where it "has the purpose or effect of 'endorsing' religion." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592-593 (collecting cases which apply endorsement standard). *See also*, J. Nowak, R. Rotunda, *Constitutional Law* sec. 17.5, at 1205 n.35 (4th ed. 1991) ("It now appears that the endorsement test used by Justice O'Connor may be blending with the three-part *Lemon* test: the endorsement test may be the way in which the Court determines whether a particular

governmental law or program has a primary effect of advancing or inhibiting religion"). Justice O'Connor has justified her formulation of the endorsement test by its necessity in a pluralistic society:

Our citizens come from diverse religious traditions or adhere to no particular beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.

County of Allegheny, 492 U.S. at 627 (O'Connor, J., concurring).

Accordingly, "the Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny, supra*, at 593-94 (citing *Lynch v. Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring)).

To determine the statute's principal effect, the Court must examine Chapter 748 in the context surrounding its enactment, along with its perceived and actual effect on the advancement of religion. In *County of Allegheny*, this Court considered religious displays in their context to determine whether they violated the Establishment Clause. In *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), this Court

cautioned that "the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any — or all — religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated." *Id.* at 389.

Examined in the context of Rabbinical control over the Satmarer sect and Kiryas Joel in particular, the principles enunciated in *County of Allegheny* and *Grand Rapids* render Chapter 748 unconstitutional.

At the time Chapter 748 was debated and passed, the State Legislature was on notice that Kiryas Joel was an atypical community. Simply categorizing the community as Hasidic ignores the role of the Rabbi and Grand Rabbi over community affairs. According to the Rabbi:

It is the essence of being a Satmarer that they adhere to the religious principles, teachings, and orders of their Rabbi. An individual who fails to adhere to the tenets of the Rabbi is no longer following the principles established by the Satmar. There is an inherent commitment to devote every aspect of an individual's being to the Rabbi's teachings and directives.

Because the Grand Rabbi had selected and endorsed the candidates for Kiryas Joel's first school board election, and punished a leading dissident for campaigning against Rabbinical authority, substantial doubt is cast on the democratic nature of the electoral process governing this

school district. Moreover, the exclusionary residential policies which community leaders have promulgated and enforced undermines their pronouncement that the schools can remain free from improper religious influence. These policies were announced as the State Legislature debated whether to create the district. Chapter 748 thus advances religion in its principal and primary effect because its passage constitutes an endorsement by state officials of the Satmarer faith as promulgated by Kiryas Joel community leaders. *Lemon v. Kurtzman*, 403 U.S. at 612.

Moreover, Chapter 748 fails the endorsement test because creating a school district in a Rabbinically-controlled community like Kiryas Joel makes "adherence to (the Satmarer sect) relevant . . . to a person's standing in the political community." *County of Allegheny*, 492 U.S. at 593-94, citing *Lynch v. Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring). No other community like Kiryas Joel exists in the surrounding area, much less one whose population must adhere to Jewish law according to Rabbinical orders. By not allowing non-Satmarers to move into the village of Kiryas Joel, this village becomes a political religious community of only one religious sect. By catering to the desires of this sect, the State Legislature endorsed the sect's religion and behavior. If displaying a creche in a county courthouse creates the effect of endorsing the Christian faith, *County of Allegheny*, 493 U.S. at 601-02, then granting Kiryas Joel a school district, in light of the strict religious control governing its public life, clearly endorses this Rabbi's authoritarian behavior. This is especially true considering the approach to education taken by ultra-orthodox Hasidim, who view religious education as a necessity and seek to educate their children about the Torah.

Finally, Chapter 748 "fosters a close identification of (the government's) powers and responsibilities with those of" the Satmarer sect. Creation of a school district in Kiryas Joel, in

light of the screening process for incoming residents, not to mention the veto power community leaders possess over a renter's desire to lease property to an outsider, and the requirement that developers must pay the Yeshiva \$10,000 per unit, is tantamount to the government promoting the Satmarer faith. Indeed, the community leaders who enforce these restrictive policies and Rabbinical orders are the same people who benefit from the school district's creation. *See, Grand Rapids*, 473 U.S. at 389.³

(C) The village school district creates an excessive entanglement between government and religious authorities

A governmental practice violates the Establishment Clause when it creates an excessive entanglement between government and religion. *Lemon v. Kurtzman*, 403 U.S. at 613, citing *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). Close scrutiny is necessary to determine whether a church-state relationship amounts to an excessive entanglement. *Lemon, supra*, at 614. Accordingly, the *Lemon* Court established the following guidelines necessary to this inquiry:

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the

³ Abraham Wieder, President of the petitioner School Board, also serves as President of the Congregation, one of three board members of the Yeshiva, Deputy Mayor of the Village and the Village/Congregation/School Board's chief spokesperson. Simon Kepec, President of the Yeshiva, is also a member of petitioner School Board. Mendell Schwimmer, a Village Trustee, is a school board member.

State provides, and the resulting relationship between the government and the religious authority.

Id. at 615.

Both facially and as applied, Chapter 748 clearly constitute an excessive entanglement.

- (1) **The Grand Rabbi's ability to slate and successfully endorse candidates creates an excessive entanglement because he is effectively vested with power over governmental functions.**

A statute vesting governmental powers with religious authorities violates the Establishment Clause because it creates an excessive entanglement. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-27 (1982). "Government can run afoul of (the Establishment Clause) . . . (by) excessive entanglement with religious authorities, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines." *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring)(citing *Larkin, supra*). The prohibition against governance by religious authorities is consistent with the long-held fear that religious oppression may result from church control over civil society. "At the time of the Revolution, Americans feared not only a denial of religious freedom, but also the danger of political oppression *through a union of civil and ecclesiastical control*." *Id.* at 127 n.10 (citing B. Bailyn, *Ideological Origins of the American Revolution* 98-99, n.3 (1967)). See also, *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("The real object of the [First] Amendment was . . .

to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government"), quoting 3 J. Story, *Commentaries on the Constitution of the United States* 728 (1833).

The process governing Kiryas Joel school board elections creates an excessive entanglement in two ways: First, no logical distinction exists between the church control over liquor licenses held unconstitutional in *Larkin* and the Grand Rabbi's control over school board candidates here. Secondly, the Grand Rabbi effectively sets school board policy by selecting its members and punishing those who seek office without his endorsement, such as dissident Joseph Waldman, who campaigned without Rabbinical permission. Accordingly, Chapter 748 unconstitutionally vests legislative power over this "public" school district in Kiryas Joel's religious hierarchy.

In *Larkin*, this Court invalidated a Massachusetts statute which vested "significant government authority in churches" by granting them veto power over liquor license applications for establishments located near the church. *Id.* at 126. In holding the scheme unconstitutional, this Court reasoned:

[T]he core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions. The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.

Id. (cites omitted).

The *Larkin* Court applied the "neutrality" principle governing the Establishment Clause as articulated in *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 222 (1963). This principle aims to prevent "powerful sects or groups (from) bring(ing) about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or all orthodoxies." *Id.* In *Larkin*, this Court concluded that "nothing could be more offensive to the spirit of the Constitution" than a statutory scheme which allowed churches absolute control over significant matters normally left to the legislature. 459 U.S. at 127. The same result is compelled here.

Like the legislative power granted to the church in *Larkin*, the electoral process here unconstitutionally fuses religious and governmental functions because the Grand Rabbi admittedly hand-picks the Kiryas Joel School Board. The Grand Rabbi's authority over community affairs guarantees the election of any school board candidate he endorses. In fact, the Grand Rabbi severely punished one school board candidate who campaigned without his blessing, sending a message to other dissidents that the community's religious leadership tolerates no independent candidacies even for clearly public offices. The power to select political candidates is as much a governmental function as the power, examined in *Larkin*, to grant liquor licenses. This Court has equated a political organization's racially-motivated rejection of political candidates with unconstitutional state action where the organization's endorsement, as a practical matter, was tantamount to election. *Terry v. Adams*, 345 U.S. 461 (1945). Compare, *Smith v. Allbright*, 321 U.S. 649 (1944) ("[t]he privilege of membership in a political party may be . . . no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select

nominees for general election, the State makes the action of the party the action of the State"). Just like the racial eligibility scheme that was struck down in *Terry* because of the discharge of a governmental function by private parties in a discriminatory manner, the Grand Rabbi's prohibition against dissident school board candidacies taints the "public" nature of the Kiryas Joel school district and invalidates it. See, *Chicago Police Department v. Mosley*, 408 U.S. 92 (1972) (ordinance could not single out labor picketing for punishment because the Equal Protection Clause prohibits content-based speech restrictions). Accordingly, the electoral process created pursuant to Chapter 748, as applied, clearly violates the Establishment Clause pursuant to *Lemon's* requirement that courts "closely scrutin(ze)" the "resulting relationship between government and religious authority" to protect against an excessive entanglement. *Lemon v. Kurtzman*, 403 U.S. 602, 614, 615 (1971) (cite omitted).

Moreover, the Grand Rabbi's influence over school board policy is inherent and based upon religious teachings fundamental to the Satmarer sect. If only his candidates may run for the school board without fear of ostracism, banishment and violence, one cannot expect the governing body to independently decide educational matters apart from the Grand Rabbi's influence. Hence, the Grand Rabbi is effectively vested with the governmental function of setting school district policy, a result which plainly violates the Establishment Clause just as clearly as Massachusetts's statute which allowed churches to enforce the liquor laws by granting them power to decide which establishments to license. *Larkin, supra*. Here, as in *Larkin*, the "statute enmeshes churches in the exercise of substantial governmental powers contrary to (this Court's) interpretation of the Establishment Clause." *Id.* at 126. This fusion between governmental and religious functions "substitutes the unilateral and absolute power of the (Grand Rabbi) for reasoned decisionmaking of a public legislative

body acting on evidence and guided by standards, on issues with significant economic and political implications." *Id.* at 127. *Lemon* makes clear the unconstitutional nature of this arrangement: "Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and *churches excluded from the affairs of government.*" *Lemon*, 403 U.S. at 625 (emphasis added). Because the Grand Rabbi's power is elevated by the nature of his control over the electoral process, Chapter 748 violates the Establishment Clause.

The Grand Rabbi's de facto control over school board operations distinguishes this Court's holding in *McDaniel v. Paty*, 435 U.S. 618 (1978). There, this Court held that the state cannot disqualify religious figures from serving in state governments. By contrast, the Grand Rabbi here does not formally serve on the Kiryas Joel School Board. Rather, his control and influence over the body is inescapable and absolute in view of his power to select its members and successfully command residents to vote for them. The Grand Rabbi's punishment of a school board candidate who ran against his wishes surely sends a message to board members placed there by the Grand Rabbi: the Kiryas Joel School District is run as the Grand Rabbi desires. *See, Larkin, supra.*

- (2) The excessive entanglement caused by creation of the village school district has fostered the kind of divisiveness necessary to constitute a violation of the Establishment Clause.**

The divisive nature of a legislative scheme plays a role in determining whether church and state are excessively entangled. *See, Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971) ("A broader base of entanglement of yet a different character is presented by the divisive political potential of

these state programs"). See also, *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 383 (1985) (state aid to parochial schools creates potential for divisiveness); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 794-98 (1973)(same); *Aguilar v. Felton*, 473 U.S. 402, 414 (1985) (political divisiveness along religious lines increases where state administrators must determine if a state-funded program for sectarian schools is used for religious messages).

While this Court has stated that divisiveness alone will not render a scheme unconstitutional, *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984), the potential for divisiveness is elevated where the state power is vested with religious authorities. In striking down a statutory scheme granting churches veto power over liquor license applications, this Court noted the potential for "[p]olitical fragmentation and divisiveness on religious lines" that would result therefrom. "Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution" (cite and footnotes omitted). *Larkin v. Grendel's Den*, 459 U.S. 116, 127 (1982).

Here, as discussed in sec. (C) (1), *supra*, Section 748 vests state power with religious authorities because, in practice, they control school board candidate selection and punish candidates who seek office without the leadership's approval. As the *Larkin* Court had predicted, this arrangement has led to significant divisiveness among Kiryas Joel residents. Community dissident Joseph Waldman, because he ran for the Kiryas Joel School Board, cost his children their opportunity for a private religious education. A state court reinstated the children after concluding they were expelled for arbitrary and capricious reasons. *Matter of Waldman v. United Talmudical Academy*, 147 Misc.2d 529 (Orange Co. Sup. Ct. 1990). The dissident then experienced a harassment campaign in retaliation for suing religious

authorities. Contemporaneous newspaper articles show the candidate's tires were slashed during the campaign. This kind of division, alarming even when sparked by normal political differences, clearly offends the Establishment Clause because division "along religious lines was one of the principal evils against which the First Amendment was intended to protect. [To] have States [divide] on [these] [would] tend to obscure other issues of great urgency." *Lemon*, 403 U.S. at 622-23.

This Court has frequently noted the role elections play in advancing the democratic process. See, *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964)("[O]ne man's vote . . . is worth as much as another's"). The aggressive nature of many elections at all levels of government points up the divisive nature of Chapter 748, under which Rabbinical slating of candidates took root during the community's first school board elections. Because Chapter 748, as applied, constitutes an excessive entanglement between government and religion, see sec. C (1), this Court should heed the *Lemon* Court's warning against divisiveness sparked by "political division along religious lines," 403 U.S. at 622, and find Chapter 748 unconstitutional.

(3) The state must continually monitor the school district in light of the Grand Rabbi's ability to control the district's affairs.

A legislative scheme violates the Establishment Clause as an excessive entanglement where the state must monitor religious institutions to ensure public money is not used for religious purposes. *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). See also, *Aguilar v. Felton*, 473 U.S. 402, 411-412 (1985)(prophylactic monitoring is especially pressing where state money flows to sectarian elementary schools as opposed to institutions of higher learning).

The unique powers exercised by Rabbinical authorities within the Kiryas Joel community necessarily require state authorities to monitor the school district to ensure they do not unconstitutionally govern school affairs. The record reveals that the community is, in fact, governed that way. See, sec. C (1), *supra*. For there to be any chance that this school district might function in a manner consistent with constitutional values, state authorities would have to constantly monitor the electoral process and other activities over which Rabbinical authorities can exert their influence. Because his congregants must heed their Rabbi's advice and, for example, seek his permission before renting to incoming residents and ignore community members he deems undesirable, the only way to ensure that this influence does not taint community's public school is constant state observation. The Establishment Clause prohibits this result.

This Court has frequently ruled that financial aid to religious institutions was unconstitutional because the degree of state supervision which would be necessary to ensure that public money is used for secular purposes excessively would entangle church and state. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971) ("A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these (monetary) restrictions are obeyed and the First Amendment otherwise respected").

In *Aguilar v. Felton*, 473 U.S. 402 (1985), this Court explained the rationale for striking down programs which allocate money to parochial schools:

The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given

denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters. '[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.

Id. at 409-10, quoting *McCollum v. Board of Education*, 333 U.S. 203, 212 (1948).

Unconstitutional aid schemes which this Court has struck down as excessively entangling compare with the creation of a public school district in the religiously-dominated Village of Kiryas Joel.

In *Aguilar*, this Court struck down New York City's Title I program as unconstitutional because it had used federal money to finance programs which involved sending public employees into religious schools for a variety of services. *Id.*, 473 U.S. at 404-07. This arrangement necessitated a pervasive state presence in the sectarian schools receiving aid to ensure the money was truly used for secular purposes.

Like the Title I program which this Court struck down in *Aguilar*, "the scope and duration" of the Kiryas Joel school district "would require a permanent and pervasive state presence in the sectarian school[] receiving aid." *Id.* at 412-13. Neither party disputes that the district receives state

assistance. Moreover, Chapter 748 is as permanent as any aid program because the creation of a public school district triggers the infusion of state money, and the Satmarer sect is not expected to alter its vision of the model congregation anytime soon.

CONCLUSION

For foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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Nos. 93-517, 93-527, 93-539

In the
Supreme Court of the United States
October Term, 1993

**Board of Education of the Kiryas Joel Village
School District, et al,**
Petitioners,

v.

Louis Grumet and Albert W. Hawk,
Respondents.

**ON WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS**

**BRIEF AMICUS CURIAE OF
NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF
RESPONDENTS**

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BRIEF AMICUS CURIAE OF
NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF
RESPONDENTS

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

INTEREST OF THE AMICUS

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents the nation's 95,000 school board members, who, in turn, govern 15,173 local school districts that serve more than 40 million public school students -- approximately 90 percent of all elementary and secondary students in the nation.

School boards across the country are dedicated to the proposition that all students should have equal access to an education to prepare them for a lifetime of learning in a diverse, democratic society and an interdependent global economy. *Amicus* supports the constitutional right of parents to educate their children in a private

religious school or at home, but it is not only unconstitutional but bad educational policy for the State to establish separate public schools for members of a religion. In so doing the New York State Legislature has violated a principle at the very heart of the establishment clause, and in the name of expediency has totally eviscerated the purpose behind public schools to guarantee all students the right to a public education without regard to their race, color, sex or religion.

ARGUMENT

Introduction.

Petitioners and their *amici* claim that the State's action in this case merely "accommodates" the special education needs of a group of students who coincidentally are members of the same religion. That characterization is disingenuous. This is not a special education case. The long litigious history in this case has never pertained to

whether the school district was complying with its obligations under the IDEA. The dispute has always concerned where the services should be provided -- in a public school, a religious school or a "neutral" site.

The state and the school board did what political entities often do to solve this nagging local controversy they took the expeditious road. But the Constitution does not permit all political solutions to problems even if arguably taken in good faith. What the state did in this case was wrong, cutting to the very essence of the Constitution.

The state's actions do not raise special education issues but rather primal establishment clause issues. Can a state constitutionally create a system of religious apartheid? The answer should be a resounding "no." It matters not what test is applied by this Court. The core constitutional principle involved in this case is far more profound

than any test the Court might use or devise to protect it.

I. No educationally sound reasons justify Chapter 748.

A. Monroe-Woodbury could have complied with the IDEA without the drastic action taken by the State.

Petitioners and their *amici* imply that the action taken by the state in this case merely provides special education and related services to a number of Satmar students in accordance with the IDEA and the New York statutes adopted thereunder. But examining the IDEA itself and the course of litigation in this case clearly dispels the false notion that all Petitioner Kiryas Joel seeks in this case or that the other Petitioners sought to provide was secular education services in compliance with the IDEA. Such services either were being provided, or at least could have been provided, before Chapter 748 was adopted.

20 U.S.C. 1413 requires each state participating in the IDEA to make certain assurances. Among other requirements, a state's plan must include policies and procedures to assure "that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services." 20 U.S.C. 1413(4)(A). The statute distinguishes between private school students who are placed there by their parents for reasons other than compliance with IDEA -- such as the students at issue in this case who were enrolled in private religious schools but wanted to receive certain special education and related services from the public schools -- and students who are placed in a private school

because the public school is unwilling or unable to provide a "free appropriate public education" under the Act. 20 U.S.C. 1413(4)(B). *Burlington School Comm. v. Dept. of Educ. of Mass.*, 471 U.S. 359 (1985), and *Florence County v. Carter*, 114 S.Ct. 361 (1993), for example, involved students in private schools who were placed there by their parents because the public schools had allegedly failed in their responsibility to provide a "free appropriate public education" as required by the IDEA. In contrast, the student in *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462 (1993), was admittedly placed in the private school because the parents preferred a religious education for their child and they sought a related service from the public schools. The Department of Justice took the position in their brief in *Zobrest* that the school district would not be required by the IDEA to

provide a sign language interpreter to the child.

[Respondent school district] maintains that the IDEA does not require it to furnish petitioner with an interpreter at any private school so long as special education services are made available at a public school. The United States endorses this interpretation of the statute, explaining that 'the IDEA itself does not establish an individual entitlement to services for students placed in private schools at their parents' option.'

113 S.Ct 2462, 2470 (Blackmun, J. dissenting 1993).

Although Monroe-Woodbury may elect to provide a wide variety of related services to the Satmars, as the school district in Zobrest did, the IDEA does not require the school district to assume the same level of responsibility for the educational needs of children placed at their parents' option in private schools as for those enrolled in the public schools. Private school students are entitled to a fair share of the services provided under the Act, but the panoply of

procedural requirements of the IDEA discussed at length in *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), are not required to be met and the free appropriate public education requirement is more limited. Under this statutory framework, Monroe-Woodbury's and the Satmars' all or nothing deal was clearly unnecessary and resulted in a peace agreement that is patently unconstitutional. Other less drastic measures very likely could have been devised to serve most, if not all, of the disabled children in the community, without requiring the children to attend Monroe-Woodbury against their parents' wishes.

In an earlier case involving the on-going dispute between the residents of Kiryas Joel and the Monroe-Woodbury School District, the court noted that the disabilities of the children included "mental retardation, deafness, speech and language impairments, emotional disorders, learning disabilities,

Down's syndrome, spina bifida and cerebral palsy." *Board of Education of the Monroe-Woodbury Central School District v. Wieder*, 531 N.Y.S.2d 174 (Ct.App.N.Y. 1988). Many of these children could be served outside the public school under current case law. In *Wolman v. Walter*, 433 U.S. 229 (1977), for example, the Court upheld the practice of providing speech and hearing diagnostic services in religious schools and providing therapeutic services at a neutral site. As noted above, a number of the disabilities are physical rather than mental, and require services more analogous to those in *Wolman*, than those in *Aguilar v. Felton*, 473 U.S. 402 (1985), in which this Court held that public employees could not provide remedial education on the premises of religious schools. Physical therapy and similar services could be provided either in the public school or in a neutral location. Because of the nature of these types of services which are delivered on

a one-on-one basis rather than in a classroom situation, the Satmars may not be as concerned about bringing their children to Monroe-Woodbury to receive the services. And those children who are profoundly disabled children could be educated at home without violating either the IDEA or the Constitution.

If no constitutional method is acceptable to the Satmarer parents, they must make a very difficult choice. But they cannot force the state to create a segregated school district in order to accommodate their religious beliefs or mores.

Accommodation of the Satmars' religious practices, and not educational issues, has been at the center of each action in the long history of this case. None of the cases has raised the question of whether the educational opportunities provided to the Satmarer disabled students by Monroe-Woodbury were educationally "appropriate" under the IDEA. In *Parents' Assn. v. Quinones*, 803 F.2d 1235

(2d Cir. 1986), the court enjoined the New York City School District from segregating Hasidic girls from other children in the school. *Bollenbach v. Board of Educ.*, 659 F.Supp. 1450 (S.D.N.Y. 1987), held unconstitutional Monroe-Woodbury's practice of using only male school bus drivers to transport male Kiryas Joel students to their religious academy. Finally, in *Board of Education of the Monroe-Woodbury Central School District v. Wieder*, 72 N.Y.2d 174 (1988), the school district sought a declaratory judgment to the effect that state special education statutes prohibit the district from providing special education services except in regular classes of public schools. The defendants counterclaimed, seeking a ruling that the services must be provided in the private religious school. The defendants later limited their demand to a "neutral" site. The New York Court of Appeals refused to hold that the law requires that the

services be provided in any particular setting and stated that the board "is not without authority" to provide the services outside the public school.

In *Wieder* the defendants raised the issue of infringement of free exercise of religion rights for the first time in the court of appeals, arguing that Monroe-Woodbury's "public school placements interfere with the free exercise of their sincere religious beliefs . . . , that compelling the children to attend regular public school classes and programs forces them to choose between following the precepts of their religion and foregoing benefits on the one hand, and accepting benefits while violating their religious beliefs on the other." 72 N.Y.2d at 188. The court refused to rule on the issue, noting that "the defendants in their submissions to the trial court [argued] that they should be exempted from public school placements only for nonreligious reasons.

They made no showing that any sincere religious beliefs were threatened by requiring limited public school attendance, only for special services . . . Thus, there is no basis here for the constitutional right now asserted by defendants and found by the trial court. [Emphasis in the original.]" *Id.* at 189.

Perhaps now to soften their claim that religious segregation is not the primary issue here, the brief of Petitioner Kiryas Joel misstates the reason for the court of appeals rejection of the parents' free exercise claim in *Wieder*. Brief of Petitioner Kiryas Joel at p. 8. The court's rejection was not based, as is implied in Petitioner's brief, on the "explicit conclu[sion] that the emotional impact on the children of traveling out of Kiryas Joel' alleged by the parents was a 'nonreligious reason' for keeping the disabled Satmar children out of the Monroe-Woodbury schools."

No one disputes the fact that there are children in the Kiryas Joel community who are in need of special education services and who are eligible for services under the IDEA. Monroe-Woodbury contended in *Wieder* that the children who attended the public school programs were progressing in their education. 72 N.Y.2d at 181. But we don't know whether or not they were progressing. We don't know what services would be appropriate for each of the children or what would be the appropriate educational placement for each child. We don't know whether the issue of appropriate education was ever even discussed. Instead, Petitioners opted to form a new general purpose school district for the exclusive use of the Satmars. The motivating force behind Chapter 748 was not to provide an appropriate education for students with disabilities, it was passed to allow students of one religion to be educated in an environment segregated from students of other religions. There is no

question that the statute was passed for religious not educational reasons.

- B. **Monroe-Woodbury could have provided needed English as a second language training without establishing a separate school district for the students on the basis of their national origin.**

Petitioners argue that the separate school district was necessary because the Satmar students do not speak English. If that were a valid educational argument, most of the school districts in this country would be segregated on the basis of national origin. The number of limited English proficient students is growing in many school districts across the country. U.S. General Accounting Office Report to the Chairman, Senate Committee on Labor and Human Resource, *Limited English Proficiency: A Growing and Costly Educational Challenge Facing Many School Districts*, (January 1994). According to the GAO, more than 21.3 million limited English proficient students live in the United States.

The report cites one district that had 99 Rumanian students located in 12 different schools and representing six grade levels. This same district had several schools with students from as many as 15 different language backgrounds, often with fewer than 24 students in a given language groups. *Id.* at 10. The problems of educating the Satmars may present an educational challenge, but similar challenges are being met by many school districts across the country without the need to carve out separate school districts. This country has avoided the problems Canada is facing with its French-speaking population because of our constitutional guarantees against discrimination, our laws against segregation and our educational programs that teach students in their native language while preserving their cultural diversity.

Segregation on the basis of national origin is a violation of title VI of the Civil Rights Act of 1964, which prohibits

discrimination on the basis of race, color or national origin by recipients of federal financial assistance. 42 U.S.C. § 2000d. A number of years ago the U.S. Department of Education (then the Department of Health, Education and Welfare) developed what has become known as the "Lau Guidelines," to provide guidance on the requirements of title VI to rectify language deficiencies of limited English speaking students. 35 Fed. Reg. 11595 (1970). This Court upheld those guidelines in *Lau v. Nichols*, 414 U.S. 563 (1974). Although the guidelines have been challenged since that time on the ground that title VI prohibits only *intentional* acts and does not cover acts which have a discriminatory *impact*, *Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582 (1983), it is clear that the educational remedy is not to segregate all the children into a separate school district. The remedy is to teach them English as soon as possible, and where necessary, to teach them

core subjects in their native language. Monroe-Woodbury would not be precluded by either the establishment clause or title VI from the limited use of segregated classes for the purpose of teaching English to the Satmars. That would also seem to be a far more cost effective and educationally sound way to teach the Satmars than to segregate them into a separate school district.

Although not the subject of this lawsuit, it would appear that Chapter 748 is a clear violation of both the Equal Protection Clause and title VI because it segregates students on the basis of their national origin.

II. Chapter 748 strikes at the core of the Establishment of Religion Clause and should be held unconstitutional under any of the "tests" currently in use or one which this Court creates for the decision in this case.

Petitioners and their *amici* have urged this Court either to apply the tripartite test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to uphold the statute or to overturn *Lemon* in favor of a coercion or endorsement test. *Amicus* believes that the issue in this case is so clear that the Court should hold the statute unconstitutional under any of the proffered constitutional tests. *Amicus* urges the Court, however, in the event it elects to develop a new test for the decision in this case, to refrain from formally overruling *Lemon v. Kurtzman*, which could send the wrong message to school districts across the country and to those who seek to bring religion back into the schools.

A. Chapter 748 is unconstitutional under *Lemon* and other proposed substitutes for the *Lemon* test.

Amicus agrees with the New York Court of Appeals' conclusion that Chapter 748 is unconstitutional under *Lemon v. Kurtzman* and incorporates by reference the arguments on this subject contained in Respondents' brief.

In *Comm. for Public Ed. v. Regan*, 444 U.S. 646 (1980), Justice White writing for the majority upholding a New York statute which authorized reimbursement to sectarian schools for their expense in performing state mandated recordkeeping and testing services, noted the difficulty that courts have had in deciding religion cases which "stir deep feelings."

[W]e are divided among ourselves, perhaps reflecting the different views of this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices *clarity and predictability for flexibility*, but this promises to be the case until the continuing interaction between the courts and the States ... produces a single , more encompassing construction of the Establishment Clause [Emphasis supplied.]"

Id. at 662.

Justice Scalia in his dissent in *Edwards v. Aguillard* declared the reverse, that it is time to "sacrifice some 'flexibility' for 'clarity and predictibility.'" 403 U.S. 602, 640 (1987).

However difficult it may be under current law to delimit the parameters of permitted public assistance to private religious schools or public school students, the facts in this case do not present the usual line-drawing dilemmas. This is a case of intentional state segregation of students on the basis of religion. Justice Rehnquist stated in his dissent in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 126, 129 (1982) (Rehnquist, J. dissenting), that "we do not need a three-part test to decide whether the grant of actual legislative power to churches is within the proscription of the Establishment Clause of the First and Fourteenth Amendments." Similarly, we don't need a three-part test to

decide whether a school district organized and intended for the exclusive use of one religion is within the proscription of the Establishment Clause.

Amicus urges this Court to avoid explicitly overruling that decision. In spite of the difficulty application of the *Lemon* test may sometimes cause, it has been the test for 20 years and school people, students and parents have relied on it. If the Court in this case expressly overturns *Lemon* in order to develop a "new test" assuredly that action will send out a message to schools, students, parents and communities throughout this country that all of the religion in the schools cases are no longer "good law" or at least are questionable. Any serious move from the strong stand this Court has held in the past to separate religion and the state will be a clarion call to those who want to establish religion in the schools.

The Court can merely ignore *Lemon* and apply other precedents, as it did in *Zobrest v. Catalina Foothills School District*; or use a different test without citing *Lemon*, as it did in *Lee v. Weisman*, 112 U.S. 2649 (1992). But *Amicus* urges the Court not to jeopardize all of the rulings decided under *Lemon* by formally overturning the decision, merely in order to tidy up the legal landscape.

If establishment clause precedent is suddenly thrown into disarray by abandonment of the *Lemon* test, schools no doubt will face the very kind of religious divisiveness against which the first amendment is intended to guard. Given the vast ethnic and religious diversity among those who attend and work in the public schools reversal of *Lemon* could take public schools and their leaders down a perilous road.

B. Chapter 748 establishes a system of religious apartheid that is unconstitutional on its face and reprehensible as a matter of educational policy.

The annals of American history are replete with examples of minorities seeking refuge from religious persecution, from Brigham Young and his Mormon followers to the refugees from Hitler's death camps. The Satmars came to this country for the same reason as other oppressed minorities, seeking a land where the law protects minorities from discrimination by the majority.

The Satmars have the Constitutional right to form their own private schools, *Society of Sisters v. Pierce*, 268 U.S. 510 (1925), and to provide a religious education to their children free from interference by the State, *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Tolerance is not merely a moral virtue, it is a matter of constitutional policy. But the religious diversity protected from interference by the Constitution creates a parallel need for a constitutional restraint keeping the state from establishing religion. When the state establishes a public school

district for the exclusive use of members of a religious sect solely in order to segregate the members of the sect from those outside the religion, the state establishes religion.

Petitioners' arguments seem to be somewhat contradictory. They argue first that because the services provided by the public school district are "secular," it does not matter that all of the students are Hasid. Second, they argue that the state's action in creating the district was merely "accommodating" the religious tenets of the Hasidim and, third, they contend that any benefit to religion is merely "incidental."

1. The issue is not the neutrality of the services provided; it is the service delivery system that is the problem.

Unfortunately, the State and Monroe-Woodbury totally miss the point in their arguments in this case. They assert that all the state sought to do was provide an opportunity for a group of children to receive special education and related services and

training in English. That argument is akin to Louisiana's argument in *Plessy v. Ferguson*, 163 U.S. 537 (1896), that it was just transporting citizens; or to the argument of Kansas in *Brown v. Board of Education*, 347 U.S. 483 (1954), that it was just educating kids; or South Africa's system of apartheid was merely an "accommodation" to a minority of its citizens.

Petitioners Monroe-Woodbury and Attorney General of New York equate this case with the state's provision of fire and police services to a religious community. That is a *non sequitur*. Since this is a facial challenge, we must accept as true the assertions of the Petitioners that students in Kiryas Joel are not segregated by sex and the curriculum is entirely secular; we must assume that the services provided in the segregated setting are "neutral." But the issue in this case is not neutrality of the services provided, it is the service delivery system that is the

problem. Would an ordinance that establishes one fire department to serve houses with mezuzahs on the doorposts and one to serve houses with crosses on the doorposts pass constitutional muster?

Here the state has done exactly that with regard to education -- it has created a separate general purpose school district for the sole reason that members of a religious group, who all sides admit are the only residents of the Village, want to segregate their children from those who are not members of their religion. Petitioners' attempts to characterize the Satmarer Hasidim's desire to segregate as "secular" is not credible. The Governor's statement on signing the legislation noted that it was "an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the Village of Kiryas Joel, whose population are all members of the same religious sect." Joint Appendix at 40.

Petitioners argue that because the Kiryas Joel School District encompasses the same boundaries as the Village of Kiryas Joel and because anyone is entitled to move into the village and attend the public school, the school district cannot be said to be segregated. Although the constitutionality of the Village is not at issue in this case, it is arguable that the Village itself is unconstitutional. The decision of the supervisor approving the petition for the creation of a new village and ordering an election did not, of course, reach this issue because he was authorized only to determine whether procedural requirements were met. But his decision is replete with references to the actual reasons behind the petition. The supervisor stated that since fire, police, transportation and highway services are at least, if not more, adequate as those in the rest of the Town of Monroe, "why then is there a need to incorporate?" He concluded that

the reason lay in the "makeup of the individuals who will reside within this new village" who are all of the Satmar Hasid faith.

[T]he sociological way of life for the Satmar Hasidic is one of *disdained isolation* from the rest of the community. These factors are at the root of their need to incorporate. . . The Satmar Hasidim has taken advantage of an obviously archaic State statute to slip away from the Town's enforcement program without the Town having the slightest possibility of commenting on the inappropriate reasons for formation of the new village. [Emphasis supplied.]

Joint Appendix at 10-14.

Petitioners argument that anyone is free to move into the community and attend the public school is not realistic given the history of the community and the nature and intensity of their religious beliefs. It is not likely that the Kiryas Joel School District will ever be integrated. The Satmars are regulated by their religion and their Rabbi in virtually all aspects of their daily

lives -- including dress, the absence of television, English newspapers and segregation of the sexes in the Village. Although no ordinances, recorded legal instruments or other governmental regulations restrict ownership of property in Kiryas Joel, pressures are imposed on the Satmars by their leadership and their deeply held religious convictions. It is doubtful that any resident of the Village of Kiryas Joel would rent or sell their property to an outsider, because of the fear of possible retribution by their religious leadership. *New York Times*, January 3, 1994, p. A 20, *Der Yid*, Friday, February 3, 1989, Vol. XXXVIII No. 19. Furthermore, even were non-hasadic students to move into the Village, they would not go to school in the Village. The Monroe-Woodbury school district in a letter to the Governor urging that he sign Chapter 748, stated that non-hasidic students will be "tuitioned out" to Monroe-Woodbury. Pet. App. (AG) at 101a.

Therefore, the Petitioners have made certain that the school district remains totally Hasidic, in the unlikely event that a non-Hasid child should move into the community.

2. Chapter 748 is not a mere "accommodation" of religion or of the secular educational needs of the Satmars. It is establishment of religion in its purest form.

Petitioner Attorney General of New York equates the action of the state here with constitutionally permissible "accommodations" in *Zorach v. Claiborn*, 343 U.S. 306 (1952), and *Wolman v. Walter*, 433 U.S. 229 (1977), and notes that the state can voluntarily "accommodate" religion without establishing religion. That is correct, provided the "accommodation" is not a total capitulation to the religious demands of those that seek the accommodation. There is an ocean of difference between allowing students to leave school early, providing therapeutic services to students, or exempting persons from otherwise neutral state requirements, such as

the prohibition of the use of peyote or compulsory attendance laws, because of religion and the action taken by the state here. Certainly, the Constitution allows, and in some cases may require, the state to lift the burden it has placed on religious freedom by providing an accommodation through an exception to, or adaptation of, a requirement. That is what the Court required in *Yoder* and what the peyote exemption statutes do. But Chapter 748 is not an accommodation, it grants an extraordinary benefit to members of one religion. It creates a separate public school district for the sole purpose of segregating members of one religion from non-believers in the other district. Petitioners may call that an "accommodation" but *amicus* can find no decision of this Court that would allow, as an accommodation, the segregatory statute at issue here.

The "accommodation" cases cited by Petitioners are inapposite. In *Wisconsin v.*

Yoder, 406 U.S. 205, the Court required the state to grant an exemption from compulsory education in order to relieve the substantial "burden" on their free exercise beliefs. The Satmars seek no exemption but rather seek segregated educational services. *Wolman* is not an "accommodation" case and, in fact, as was noted above, *Wolman* would allow many of the services allegedly sought in the case to be provided in the public school, thus alleviating any need to form a separate district.

Whether one considers the establishment clause as a Jeffersonian "wall" or a way to protect religious liberty, the clause prohibits the kind of action taken here because this type of intentional state segregation of religion -- even if arguably to accommodate the religious beliefs of one faith -- endangers the religious liberties of us all.

3. The religious segregation mandated by Chapter 748 is not merely an "incidental" consequence of the state's attempt to provide special education services and English language training, segregation is the only goal of the statute.

Petitioner Attorney General, citing *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), and *Lynch v. Donnelly*, 465 U.S. 668 (1984), argues that the religious segregation of the two school districts in this case is merely an "incidental" benefit to religion arising from the state's attempt to provide special education services to the children of Kiryas Joel. Brief of Petitioner Attorney General, p. 19. If the religious consequences of Chapter 748 are only "incidental" to the legislation, why has the Monroe-Woodbury attempts to educate the Satmars been the subject of lawsuits since 1985, that challenged not the appropriateness of the services but rather their provision in an integrated setting. Like the litigation, the location of the education is not "incidental"

to the legislation, but in fact its very purpose is to create religious segregation.

Even were it true that such segregation is not a religious tenet of the Satmars, that would not save this legislation from its legal infirmities, because segregation on the basis of religion is unconstitutional regardless of whether it is arises from religious culture or religious tenet. This Court has wisely been reluctant to draw bright lines in determining whether religious beliefs are sincerely held and there is no need to do so here. See, e.g., *United States v. Ballard*, 322 U.S. 78 (1944). Whether the Satmars sought a separate educational setting for their children because of their religious tenets, as claimed by the Satmars in the court of appeals in *Wieder*, or because of the cultural values arising out of their religion, as claimed by Petitioner Attorney General, the fact remains that Chapter 748 was passed to separate the Satmars from the students in Monroe-Woodbury. Neither

a constitutional free exercise right nor a statutory right to special education gives rise to a right to receive a segregated special education. The Satmars do not have the right to force the state to provide a public education to their children in a segregated environment in order to accommodate their religious tenets or their religious culture and the state does not have the authority to do it voluntarily.

Our country is unique in its protection of religious freedom. What separates this country, even given its tremendous religious diversity, from places like Northern Ireland, Lebanon, Iran, Bosnia and other parts of the world is that our Constitution considers all religions important enough to require the State to leave them all alone.

C. State created religious segregation, even if benevolent, is unconstitutional.

The creation of this religiously segregated district at issue here in some

respects resembles the state's action in *United States v. Scotland Neck City, Board of Education*, 407 U.S. 484 (1972). In that case, this Court overturned the action of the State of North Carolina creating a separate school district for the City of Scotland Neck for the sole purpose of avoiding a desegregation decree affecting the county in which Scotland Neck was located. A concurrence by Chief Justice Burger and Justices Blackmun, Powell and Rehnquist pointed out that the action taken in creating the separate district was "substantially motivated by the desire to create a predominantly white system more acceptable to the white parents of Scotland Neck. In other words, the new system was designed to minimize the number of Negro children attending school with the white children residing in Scotland Neck." *Id.* at 492.

In a similar vein, the State of New York has carved out a separate school district in

order to minimize the number of non-Hasidic students attending school with the Hasid. The purpose here is no more just to provide special education than was the action of the State of North Carolina designed only to provide education. In both cases the action was taken to provide a *segregated* education.

The question then arises as to whether it matters that the State acted in good faith. No harm, no foul? Virtuous state-imposed religious segregation is an oxymoron but, for the sake of argument, let us assume that the residents of Monroe-Woodbury and the residents of Kiryas Joel support Chapter 748 and, therefore, the action was arguably benevolent. This Court's decisions in other contexts reveal that state benevolence alone cannot justify otherwise unconstitutional segregation. In *Shaw v. Reno*, 113 S.Ct. 2816 (1993), this Court stated that in a voting rights case raising an equal protection claim, invidious intent is relevant only in order to

uphold a claim of vote *dilution*. The Court overturned South Carolina's racial gerrymander stating that "Nothing in [*United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977)], holds that "benevolent racial gerrymandering" is not unconstitutional. The Court concluded that if the allegation of racial gerrymander remains uncontradicted, the lower court must determine whether the state's action was narrowly tailored to further a compelling governmental interest.

This Court has also dealt with so-called "benign racial decisions in its affirmative action decisions. In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Court held that a school board must show that extending protection from layoffs on the basis of race must be justified by showing that it is narrowly tailored to meet a compelling state interest. Societal discrimination alone is insufficient to justify preferences.

Similarly, in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), the Court overturned the city's program of granting racial preferences to contractors without narrowly tailoring it to a compelling state interest.

Chief Judge Kaye in her concurrence in this case states her belief that *Larson v. Valente*, 456 U.S. 228 (1982), should control the decision in this case. In that case, this Court developed an alternative test to *Lemon* in deciding cases involving discriminatory treatment of religions. Under that test courts would treat religion as a suspect class, which it is by virtue of its being a fundamental right under the Constitution, and would require the state to justify its action as being narrowly tailored to meet a compelling governmental interest. Chief Judge Kaye's concurrence cites the case in support of her belief that a equal protection standard is an appropriate test to be used in this case.

The State's creation of a separate public school for a small religious sect perhaps sends no signal to any other religion that the state favors the Hasidim and may seem benevolent, but if we say the law of the land permits this type of segregation, it does not end here. If it is not wrong for the state to set up a segregated school district for the Hasidim, then why would it be wrong to set up a separate school district for blacks in Detroit, Spanish-speaking immigrants in Florida, or Mormons in Utah? State-imposed segregation is unconstitutional; it is wrong and it is atrocious educational policy.

The question in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), was not over the quality of education provided to members of the two races, the question was whether state mandated separation of the races in the schools violated principles of Equal Protection. *Brown* held that separate was inherently unequal and, therefore, violated the equal

protection rights of the minority race. That principle also applies where it is the minority race that seeks separation. Furthermore, in this case members of the majority religion who are enrolled in Monroe-Woodbury are members of minority races and believe, even though without foundation, that the Satmars are racially motivated in their desire to segregate themselves from the rest of Monroe.

Although *Valente* is factually distinguishable from this case because it concerned state discrimination in the form of denial of benefit to a minority religion, as opposed to granting of a benefit to a minority religion as is the case here, the compelling state interest test used in *Valente* and in equal protection cases would seem to be equally applicable because of the close parallel between race discrimination and discrimination on the basis of religion.

Certainly, religion is no less a suspect class than race. *Newsday*, September 3, 1986.

It would appear that a simple prohibition on segregation on the basis of religion in the absence of a showing that the state's policy is narrowly tailored to achieve a compelling governmental interest would protect the religious liberties of the protected class while assuring that the state does not itself establish religion. There are other ways to serve the secular educational needs of the Satmars than through total segregation in a separate school district. There may come a time when a particular child cannot be adequately served by the public schools without violating either his or her religious principles or the principle of establishment clause but there is no evidence that has happened yet. In that situation, which *Amicus* submits will not occur often, the choice of whether to forfeit government benefits or religious principles will have to be made by

the particular Satmar family in a similar vein to what they allegedly have done here when they refrained from adhering to sex segregation rules of their religion in order to partake of the special education benefits in the Kiryas Joel School District.

It is far too early to tell whether the Satmars can be served by the Monroe-Woodbury School District because the controversy has never related to pedagogical concerns. There is enough flexibility in this Court's establishment decisions to allow many, if not most, students to be served in neutral settings. If the problem in this case is indeed pedagogical, as asserted by Petitioners, then pedagogical tools must be used to remedy it. What the State has done here violates every principle of good pedagogy and good government and is unquestionably unconstitutional.

Conclusion

For the foregoing reasons, *Amicus* urges this Court to affirm the court of appeals decision in this case.

Respectfully submitted,

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STATEMENT OF INTEREST

Council on Religious Freedom is a national, nonprofit organization formed to uphold and promote the principles of religious liberty. Its board of directors, composed of individuals active in religious affairs, some in an official capacity and others on a lay basis, advocate these principles in state and federal courts throughout the country.

Because of Council on Religious Freedom's focus on the relationship of the Free Exercise Clause to the Establishment Clause, it offers to this Court an experienced and informed voice on the issue *sub judice*.

SUMMARY OF ARGUMENTS

A statute creating a separate school district for residents of a religious community is an act of religious gerrymandering and violates the Establishment Clause.

First, legislation which singles out a particular religious group for special benefit constitutes religious discrimination and thus requires strict scrutiny. Such a law must be closely fitted to a compelling state interest. Here, the legislature granted the Hasidic community of Kiryas Joel its own public school system. Because other less extreme measures existed to achieve the state's goals, the statute, on its face, violated the Establishment Clause.

Second, a "no set of circumstances" analysis is inappropriate for laws subject to Establishment Clause analysis. The speculative possibility that non-Hasidics may one day inhabit the school district does not prevent a facial challenge. Where the Establishment Clause provides the basis for decision, appropriate considerations include: historical

background, specific events leading to enactment, legislative or administrative history, and contemporaneous statements by members of the decisionmaking body. This analysis, not the "no set of circumstances" proffered by petitioners, compels the conclusion that a school district created to satisfy demands of a religious community violates the Establishment Clause.

Third, while the statute granting the Hasidic community its own "public school district" violated each of *Lemon's* three-prong test, special concern exists with the secular purpose prong. The statute's legislative history, administrative interpretation, and the trial court's findings of fact confirm the purpose of the law was to religiously segregate Hasidic children from others in violation of the neutrality requirement of the Establishment Clause.

Fourth, other amici improperly use this case as a vehicle to challenge this Court's seminal decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). These efforts must be denied as this is not a traditional *Lemon* case involving financial aid to parochial schools. Nor is there need to address this issue when ample means exist for a decision based upon the "strict scrutiny" standard. Let such amici, who seek a review of *Lemon* and attempt to relitigate issues long ago addressed and resolved, do so in the setting of a factual record and not in the context of a non-*Lemon* case.

For these reasons, Council on Religious Freedom believes the interests of justice would be served by finding the state statute unconstitutional as an establishment of religion.

ARGUMENTS

I. THE LAW CREATING THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT WAS THE PRODUCT OF RELIGIOUS GERRYMANDERING DESIGNED TO AID THE SEPARATION TENET OF A RELIGIOUS ENCLAVE AND WAS NOT "CLOSELY FITTED" TO SERVE A COMPELLING GOVERNMENTAL INTEREST.

Although amicus believes that the creation of the Kiryas Joel Village School District violates all three prongs of the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this amicus also believes that the appropriate analysis of this special interest case was set forth by Chief Judge Kaye who noted that the Court in *Larson v. Valente*, 456 U.S. 228 (1982), "concluded that the *Lemon* test is intended 'to apply to laws affording a uniform benefit to *all* religions' [citation omitted], but that when a law expresses 'a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.'" *Grumet v. Board of Educ. of the Kiryas Joel Village School Dist.*, 601 N.Y.S.2d 61, 71 (Ct. App. 1993). Judge Kaye found that the state statute "was specifically designed to benefit Satmar Hasidim, who refuse to send their disabled children to integrated Monroe-Woodbury public schools." *Id.* at 70. She further concluded "[t]hat the law is not part of a neutral, generally applicable program of State aid but instead was intended to benefit one religious group." *Id.* at 70.

Professor Jesse H. Choper concluded that the results in *Larson* were correct although contending that the case was a free exercise instead of an establishment case. He stated that

"[r]egardless of the historical relevance that the establishment clause may have had with respect to official governmental designation of a particular religious denomination for special treatment, the Court admitted in *Larson* that its modern three-prong establishment clause test was not really fashioned for the problem of discrimination or preference among religions." Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 [Special Issue] Wm. & Mary L. Rev. 943, 958 (1987).

Professor Choper agreed that "[t]he Court [in *Larson*] actually held that discrimination among religions must survive strict scrutiny. . . . Strict scrutiny, however, also requires the state to have had no narrower means available, and the Court felt that the . . . [legislation] was neither necessary nor 'closely fitted' to achieving the state goal. Therefore, the Court held the law invalid." *Id.* at 958 and 959.

Only one of the three petitioners attempts to refute Judge Kaye's *Larson* "strict scrutiny" analysis. Petitioner Kiryas Joel Village School District claims that Judge Kaye's analysis is not supported by *Larson v. Valente* because the statute is not "patently discriminatory." (Petitioner KJVSD Brf. at 31).

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2227 (1993), this Court rejected the same facial neutrality argument which is advanced here by all three petitioners. Citing *Gillette v. United States*, 401 U.S. 437 (1971), the Court stated that "[f]acial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality.'" The Court, quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664 (1970) (Harlan, J., concurring), stated:

Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. . . . "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."

Id. at 2227.

This case represents a classic example of religious gerrymandering. A law is not necessarily constitutional on its face because of the formal neutrality of the statutory language. And the creation of a public school district expressly designed to establish a political means of serving a sectarian interest is not rendered facially constitutional simply because its boundaries are described in non-religious terms.

In *Lukumi*, 113 S. Ct. at 2222, the Court held that the city ordinance directed at the Santeria religion violated the Free Exercise Clause because "the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs." Likewise, here the Establishment Clause is violated because the principle of general applicability was violated because the secular ends asserted in defense of the law to assist the Hasidic community were pursued only with respect to conduct motivated by religious beliefs.

Here the legislative act in question does not "afford[] a uniform benefit to *all* religions." *Larson v. Valente*, 456 U.S. at 252 (emphasis in original). No other religious group in New York State has been provided a religiously segregated public school district for their children even though other

groups might well wish to have their children separated from the undesirable influences of "non-believers." To permit the principle requires its equal application, and the state may not place itself in the situation of ferreting out whether the purpose is to avoid psychological harm to the child or perceived religious harm due to the mixing of believers with non-believers.

Lukumi gives us guidance in determining whether a law is in fact neutral. The Court stated in *Lukumi*:

In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, "[n]eutrality in its application requires an equal protection mode of analysis." *Walz v. Tax Comm'n of New York City*, 397 U.S., at 696, . . . (concurring opinion). Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, as well as the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body. *Id.*, at 267-268. These objective factors bear on the question of discriminatory object. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279,

n.24 (1979).

113 S. Ct. at 2230 and 2231.

Lukumi Babalu Aye, 113 S. Ct. at 2233, further instructs that "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."¹

Utilizing an equal protection mode of analysis, one cannot conclude that this statute was substantively facially neutral or of general applicability. This is not a case "where the state has, without singling out religious groups or individuals, extended benefits to them as members of a broad class of beneficiaries defined by clearly secular criteria." *Lee*

¹The amicus brief filed by the Rutherford Institute at page 12, note 10, argues that this case is different from *Larson v. Valente*, for although the Court there applied an equal protection mode of analysis, *Larson* involved a statute which on its face imposed a disability on a religious sect. While the present case, they claim, does not involve a facial distinction. They argue that "when a 'religious gerrymander' is alleged as a result of 'accommodating' a religious practice, for state action to be unconstitutional, there must be an *evidentiary* inquiry to determine whether that accommodation intentionally advances religion [citation omitted] and results invidiously in 'excluding individuals belonging to any other group from enjoyment of the relevant opportunity.'" (*Id.* at 12). They ignore the fact that in determining whether the statute is facially neutral under the Establishment Clause, the Court may consider historical background of the decision under challenge as well as the specific events leading to the enactment of the statute and also the legislative or administrative history.

v. *Weisman*, 112 S. Ct. 2649, 2678 n.8 (1992) (Souter, J., concurring).

In *Larson*, Justice White acknowledged that this Court there had employed "a legal standard wholly different from that applied in the courts below." *Larson*, 456 U.S. at 260. He further noted that there was no finding by the district court of a deliberate and explicit legislative preference for some religious denominations over others. He also observed that "[t]here was no finding of a discriminatory or preferential legislative purpose." *Id.* at 260.

Here, however, the trial court specifically found:

There is no doubt that the legislation was an attempt by the Executive and Legislature to accommodate the sectarian wishes of the citizens of Kiryas Joel by taking the extraordinary measures of creating a governmental unit to meet their parochial needs.

Grumet v. New York State Educ. Dept., 579 N.Y.S.2d 1004, 1007 (Sup. 1992). The court also found:

The statute rather than serving a legitimate governmental end, was enacted to meet exclusive religious needs and has the effect of advancing, protecting and fostering the religious beliefs of the inhabitants of the school district.

Id. at 1007.

The court further found:

The present site can hardly be described as neutral. Rather, it lies squarely within the borders of a religious community, whose articulated goal is to remain segregated from the rest of society. Labeling the village as a "union free public school district" cannot alter reality.

Id.

The court likewise found:

The Village of Kiryas Joel and the coterminous school district is an enclave of segregated individuals who share common religious beliefs which shape the social, political and familial mores of their lives from cradle to grave. . . . In fact, this school district was created solely and exclusively to meet religious needs.

Id.

These findings by the trial court require a conclusion that the law creating the Kiryas Joel School District is unconstitutional on its face because "[s]ince *Everson v. Board of Educ.*, 330 U.S. 1 (1947), this Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can 'pass laws which aid one religion' or that 'prefer one religion over another.' *Id.* at 15." *Larson*, 456 U.S. at 246.

Justice White in his concurrence in *Edwards v. Aguillard*, 482 U.S. 578, 609 (1987), quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985), noted that

this Court believed "that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective States." All three courts below have made findings that the statute was designed for the express purpose of accommodating the separatist tenets of the Satmar Hasidic sect.

As Judge Kaye concluded, "this special interest legislation cannot be equated with the statutory scheme in *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462 [1993] [where] . . . a parochial school student sought a sign language interpreter as 'part of a general government program that distributes benefits neutrally to any child qualifying as "handicapped" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends.'" *Grumet v. Board of Educ.*, 601 N.Y.S.2d 61, 72 (Kaye, C.J., concurring). Rather, as Judge Kaye notes, "[h]ere, by contrast, the State engaged in de jure segregation for the benefit of one religious group. Establishment of a public school district intentionally segregated along religious lines is a classic example of government action that must be 'survey[ed] meticulously.'" *Id.* at 72.

This Court in *Norwood v. Harrison*, 413 U.S. 455 (1973), held that private schools may have a constitutional right to operate in a discriminatory manner if they so choose, but the state has a coinciding constitutional obligation not to provide aid to schools which made such a decision:

In any event, the constitutional infirmity of the Mississippi textbook program is that it significantly aids the organization and continuation of a separate system of private schools which, under the District Court

holding, may discriminate if they so desire. A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination.

Id. at 467.

The *Norwood* Court cited with approval Justice White's statement in *Lemon v. Kurtzman*, 403 U.S. at 671 n.2, "that in his view, legislation providing assistance to any sectarian school which restricted entry on racial or religious grounds would, to that extent, be unconstitutional." *Norwood*, 413 U.S. at 464 n.7. It would seem axiomatic that if the state is prohibited from providing secular textbooks to sectarian schools that discriminate on the basis of religion, the state may not draw political boundary lines for the express purpose of restricting entry of non-Hasidic children into a specially-created public school.

Norwood is based upon the principle "[t]hat the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination." *Id.* at 463. Also, see generally *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983). Here, however, a public school district has been established for the express purpose of continuing to segregate Hasidic children from any other children.

As this Court stated in *Edwards v. Aguillard*, 482 U.S. 578, 585 (1986), citing *Epperson v. Arkansas*, 393 U.S. 97 (1968), "teaching and learning" must not "be tailored to the

principles or prohibitions of any religious sect or dogma."² A few illustrations should serve to illustrate the impropriety of the practice here effectuated by the legislative and executive branches of the New York State government.

Loma Linda, California, an incorporated city, is an enclave primarily populated by members of the Seventh-day Adventist faith. Many Adventists reside at Loma Linda primarily because that is where Loma Linda University, a denominationally-owned university, and Loma Linda Medical Center, an Adventist owned medical facility, are located. Seventh-day Adventists generally subscribe to a creation theory. Would it be constitutionally proper for the state to create a public school district for the children residing within

²In *Edwards v. Aguillard*, 482 U.S. at 590-91, in discussing *Epperson v. Arkansas*, 393 U.S. 97 (1968), this Court observed that:

Although the Arkansas anti-evolution law did not explicitly state its predominant religious purpose, the Court could not ignore that "[t]he statute was a product of the upsurge of 'fundamentalist' religious fervor" that has long viewed this particular scientific theory as contradicting the literal interpretation of the Bible. . . . The Court found that there can be no legitimate state interest in protecting particular religions from scientific views "distasteful to them," [citation omitted] and concluded "that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." [Citation omitted.]

the Loma Linda city limits so as to provide a public education free from the teaching evolution?

Prior to last year, the Branch Davidians located outside of Waco, Texas, resided communally at a site known as Mt. Carmel. Would it have been appropriate for the State of Texas to create a special school district for the Branch Davidian children in order to prevent them from mixing with other public school children?

There are fundamentalist Christians who have elected to remove their children from public school because of the use of certain books and other educational materials with "humanistic content." A majority of like-minded parents could, under petitioners' theory, seek to establish a school district designed to protect their children from what they perceive to be anti-religious influences.

II. THE CREATION OF THE NEW SCHOOL DISTRICT VIOLATES THE "SECULAR PURPOSE" PRONG OF THE *LEMON* TEST.

As this Court stated in *Edwards*, 482 U.S. at 585, "*Lemon's* first prong focuses on the purpose that animated adoption of the Act." This Court held that "[a] court's finding of improper purpose behind a statute is appropriately determined by the statute on its face, its legislative history, *or its interpretation by a responsible administrative agency.* [Citations omitted.] The plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose." (Emphasis supplied.)

The legislative history of Chapter 748 has been set forth in respondents' brief. Of particular importance,

however, is the July 19, 1989, recommendation of disapproval issued by the State Department of Education (1 R 99-102). Among the reasons for disapproval, the Department stated:

Census data obtained from the Orange County Department of Planning establishes that every inhabitant of Kiryas Joel is white. As the decision of the Court of Appeals described above confirms, all of its inhabitants are members of one religious sect, the Satmarer Hasidim. In addition, the superintendent of schools of the Monroe-Woodbury Central School District, the district in which Kiryas Joel is currently included, reports that only one student who lives in Kiryas Joel is enrolled in the public schools. All of the remaining school age children living in the village attend private religious schools located within the confines of the village. It should be noted that geographically, the Village of Kiryas Joel is well within the boundaries of the Monroe-Woodbury Central School District.

(1 R 100-101).

The Department's recommendation of disapproval further states:

Given the nature of the dispute that apparently prompted this legislation, this bill also raises serious constitutional questions regarding potential governmental furtherance of religion in violation of the First Amendment's provision requiring the separation of Church and State. Although representatives of the

village assert that they will take extraordinary care to create a special education school devoid of any religious message or teaching, the State would be accommodating the religious beliefs of a particular religious sect by enacting legislation that furthers its decision to insulate the children of the village from the larger society.

(1 R 101).

Chapter 748 on its face violates the secular purpose test of *Lemon*. Even the New York State Department of Education -- the responsible administrative agency -- agrees. The department's recommendation of disapproval acknowledges the state would be furthering the church's desire to insulate the children from the larger society. Thus, the purpose of the statute violates the "secular purpose" test of *Lemon*.

**III. THE TRIAL COURT WAS NOT PREVENTED
FROM FINDING THE STATUTE FACIALLY
UNCONSTITUTIONAL BECAUSE OF THE
FUTURE POSSIBILITY THE SCHOOL
DISTRICT MIGHT INCLUDE INHABITANTS WHO
WERE NOT SATMAR HASIDIC JEWS.**

Petitioner Kiryas Joel Village School District, although acknowledging that the school district is now composed exclusively of Satmar Hasidic Jews, argued that this does not mean that the arrangement is facially unconstitutional. Petitioners speculate that in the future the school district may include inhabitants who are not Hasidic. It argues that under this Court's holding in *United States v. Salerno*, 481 U.S. 739, 745 (1987), and *Members of the City Council of Los*

Angeles v. Taxpayers for Vincent, 466 U.S. 789, 797-98 (1984), respondents' facial challenge to Chapter 748 requires the Court to determine "that the statute could never be applied in a valid manner." (Petitioner KJVSD Brf. at 19-20).

Petitioner thus attempts to escape from the finding of the New York Court of Appeals that the new school district being coterminous with the Satmar Hasidic Community would have only Hasidic children attending the public schools of the new school district and only members of the Hasidic sect would likely serve on the school board. (*Id.* at 20). That petitioner argues that "[a]lthough the Village of Kiryas Joel is a community which is inhabited at present solely by adherents to one faith, no one is excluded from the village on the grounds of race or religion." (*Id.*). Petitioner concludes from this that the conditions existent when the school district was established and the historical background and specific events leading to the statute's enactment are irrelevant to the question of the facial validity of the statute under the Establishment Clause. (*Id.*).

To support its defense of the statute, petitioner cites *Mueller v. Allen*, 463 U.S. 388, 401 (1983), wherein this Court stated: "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."

Petitioners' "no set of circumstances" argument does not apply to Establishment Clause claims. In *Bowen v. Kendrick*, 487 U.S. 589, 627 n.1 (1988), Justice Blackmun, although disagreeing with the majority on the primary issue before the Court, further discussed the inapplicability of the "no set of circumstances" requirement in Establishment Clause cases:

A related point on which I do agree with the majority is worth acknowledging explicitly. In his appeal to this Court, Secretary of Health and Human Services vigorously criticized the District Court's analysis of the AFLA on its face, asserting that it "cannot be squared with this Court's explanation in *United States v. Salerno*, [481 U.S. 739, 745 (1987),] that in mounting a facial challenge to a legislative Act, 'the challenger must establish that no set of circumstances exists under which the Act would be valid.'" [Citation omitted.] The Court, however, rejects the application of such rigid analysis in Establishment Clause cases, explaining: "As in previous cases involving facial challenges on Establishment Clause grounds, . . . we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)." [Citation omitted.] Indeed, the Secretary's proposed test is wholly incongruous with analysis of an Establishment Clause challenge under *Lemon*, which requires our examination of the purpose of the legislative enactment, as well as its primary effect or potential for fostering excessive entanglement. Although I may differ with the majority in the application of the *Lemon* analysis to the AFLA, I join it in rejecting the Secretary's approach which would render review under the Establishment Clause a nullity. Even in a statute like the AFLA, with its solicitude for, and specific averment to, the participation of religious organizations, one

could hypothesize some "set of circumstances . . . under which the Act would be valid," as, for example, might be the case if no religious organization ever actually applied for or participated under an AFLA grant. The Establishment Clause cannot be eviscerated by such artifice.

Reference to *Mueller v. Allen* is inappropriate here. *Mueller* was a statute that included a broad class of beneficiaries including parents of both public and private school children. The instant legislation, however, was designed to benefit only a single Hasidic community.³ As indicated in the brief of petitioner KJVSD at pages 3-4, a 320-acre religious enclave incorporated as the Village of Kiryas Joel began its incorporation process in September of 1976 -- almost 17 years ago -- and still "virtually all residents of the village are Satmarer Hasidic Jews." This is hardly a case where statistics as to the number of Hasidic Jews residing in the village will appreciably change in the foreseeable future.

That petitioner also ignores the fact that, unlike *Bowen*, it is the creation of a school district intentionally designed to exclude all but children of Hasidic Jews, not the allocation or utilization of tax-derived funds that constitutes the constitutional offense. Whether the new school district's subsequent operations cross the permissible boundary between

³As Chief Judge Kaye pointed out "this case . . . differs from previous Establishment Clause education cases" because it "is not one of the myriad 'government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion.'" (Citation omitted.) *Grumet v. Board of Educ.*, 601 N.Y.S.2d 61, 70 (Ct. App. 1993) (Kaye, C.J., concurring).

the secular and the religious is not the only constitutional concern. The constitutional boundary was violated the instant the state created a school district for the distinct purpose of exclusively serving students residing within a religious enclave. The continuing operation of a religiously segregated school district is a continuing constitutional violation. To paraphrase this Court in *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985), "[t]he legislative intent to . . . [exclusively serve a religious enclave] is, of course, quite different from merely protecting every . . . [handicapped child's right to a free appropriate public education as provided in 20 U.S.C. § 1412(1)]."

This case does not involve a law by which the Hasidic religious community's religious tenet of separateness was incidentally benefitted.⁴ Here the only reason for the line-drawing and the creation of the school district was to accede to the demands of a religious community to keep its children separate from those who are religiously different from them. The organs of civil government may not be constitutionally utilized for such a purpose.

IV. THE NEW SCHOOL DISTRICT DOES NOT REPRESENT PERMISSIBLE ACCOMMODATION.

The brief filed by petitioner Attorney General for the

⁴In *Norwood v. Harrison*, 413 U.S. at 464 n.7, this Court stated that "[t]he leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private racially discriminatory schools." This Court also held in *Norwood* that "the Constitution does not permit the State to aid discrimination even when there is no precise casual relationship between state financial aid to a private school and the continued well-being of that school."

State of New York at page 25 argues that "this Court has a long history of recognizing the acceptability in some cases for the government to make allowances for concerns that are religious in nature." Petitioner KJVSD at pages 40-43 argues that the creation of the schoci district was a valid accommodation of religion. It cites as an example *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where this Court upheld the right of the Amish religious sect to be exempt from certain compulsory school attendance laws. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 456-57 (1988), in discussing *Yoder*, this Court said that "[t]he statute at issue in that case prohibited the Amish parents, on pain of criminal prosecution, from providing their children with the kind of education required by the Amish religion. [Citation omitted.] The statute directly compelled the Amish to send their children to public high schools, 'contrary to the Amish religion and way of life.'" (Citation omitted.)

In *Yoder* the Amish merely sought to be exempt. The situation here is entirely different. Here also no statute or governmental action prevented Hasidic children from receiving special education services. Rather, it was the independent private choice of the parents to withhold the attendance of their children in a public school setting unless and until public authorities provided a site that would segregate their children from other non-Hasidic children.

In his concurring opinion in *Lee v. Weisman*, 112 S. Ct. at 2677, Justice Souter stated:

Whatever else may define the scope of accommodation permissible under the Establishment Clause, one requirement is clear: accommodation must lift a discernible burden on the free exercise of religion. [Citations

omitted.] Concern for the position of religious individuals in the modern regulatory state cannot justify official solicitude for a religious practice unburdened by general rules; such gratuitous largesse would effectively favor religion over disbelief.

Here neither government nor a private third party has imposed any burden upon the free exercise of the religious sect inhabiting Kiryas Joel.

Justice O'Connor in *Jaffree* has helpfully suggested that an accommodation of the free exercise of religion is permissible "when it lifts a government imposed burden on the free exercise of religion." 472 U.S. at 83 (O'Connor, J., concurring). As this Court noted in *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992), "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." Further, as pointed out by Justice O'Connor in *Wallace v. Jaffree*, 472 U.S. at 84 (O'Connor, J., concurring), the state has no authority "to remove burdens imposed by the Constitution itself." In *Norwood v. Harrison*, 413 U.S. at 466, this Court indicated that providing secular textbooks to students attending racially segregated schools may well have been motivated by a sincere interest in the educational welfare of all of the state's children but "good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty."

More recently, Justice Blackmun in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 27 (1989) (Blackmun, J., concurring in the judgment), in discussing accommodation in the form of a special tax exemption for religious books, indicated that he found it somewhat difficult to reconcile the

Free Exercise and Establishment Clauses values. According to Justice Blackmun, "[t]he Free Exercise Clause suggests that a special exemption for religious books is required." While "[t]he Establishment Clause suggests that a special exemption for religious books is forbidden," he opined that an accommodation in the form of an exemption from a state-imposed tax on religious literature would be appropriate if the state statute would "exempt the sale not only of religious literature distributed by a religious organization but also of philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong." *Id.* at 27-28. According to Justice Blackmun, a "narrowly tailored" law would meet the compelling interest that underlies both the Free Exercise and Establishment Clauses. *Id.* at 28.

This same reasoning is found in Judge Kaye's opinion in the instant case. She stated:

The law's overbreadth, however, goes beyond symbolism. The impasse between Monroe-Woodbury and the Satmarer concerned only special education services for disabled children. Nevertheless, the Legislature responded by creating a new public school district vested with *all* the powers of a union free school district, which are vast. Thus, for example, there is no legal impediment to the new district's operation of a public school program for nondisabled children if it chose to do so. Manifestly, the delegation of such power to the new district demonstrates that the legislation exceeded the problem that engendered it.

Grumet v. Board of Educ., 601 N.Y.S.2d at 72-73.

Judge Kaye, in further resonating Justice Blackmun's analysis in *Lee v. Weisman*, stated:

Even if some sort of separate educational services were the only viable alternative, that could have been achieved without carving out a new school district. The Legislature could have, for example, enacted a law providing that the Monroe-Woodbury School District should furnish special education services to these children at sites not physically or educationally associated with their parochial schools. That would have satisfied the parents, and would supersede any residual claim by the District that New York statutory law precludes that action.

Id. at 73.

As Justice Frankfurter stated in *McGowan v. Maryland*, 366 U.S. 420, 466-67 (1961) (Frankfurter, J., concurring), "if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone -- where the same secular ends could equally be attained by means which do not have consequences for promotion of religion -- the statute cannot stand."

V. THIS IS NOT AN APPROPRIATE CASE TO REEXAMINE THE *LEMON* TEST.

Petitioner Kiryas Joel Village School District and petitioner Monroe-Woodbury Central School District suggest that the *Lemon* test should be revisited if such action is

necessary to sustain the constitutionality of the statute. Petitioner Attorney General of the State of New York, however, does not request a review of *Lemon* but argues that the application of the *Lemon* test should result in a finding that the statute in question is constitutional.

Several amici, however, have seized this opportunity to call for a reexamination of *Lemon* and have fashioned various suggested Establishment Clause tests. This unique case, however, is not the appropriate vehicle to reappraise the three-prong *Lemon* test even if this Court believes that at the appropriate time such a reexamination is warranted.

Judge Kaye's concurring opinion below concluded that the *Lemon* test was not "the preferred analytical framework for this case," *Grumet*, 601 N.Y.S.2d at 69, because "legislation that singles out a particular religious group for special benefits or burdens should be evaluated under a strict scrutiny test, requiring that the law be closely fitted to a compelling State interest." Her analysis echoed this Court similar conclusion in *Larson v. Valente*, 456 U.S. 228 (1982), in which this Court stated that "when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Id.* at 246.

The Court concluded that "the *Lemon v. Kurtzman* 'tests' are intended to apply to all laws affording a uniform benefit to *all* religions, and not to provisions like . . . [legislation] that discriminate *among* religions." *Id.* at 252. As Justice Souter noted in *Lukumi*, 113 S. Ct. at 2247 (Souter, J., concurring) (quoting from *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)), "the Court's better practice, once supported by the same principles of

restraint that underlie the rule of *stare decisis*, is not to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."

Amicus United States Catholic Conference suggests that this Court overturn its 1985 decisions in *Aguilar v. Felton*, 473 U.S. 402 (1985), and *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985). Both of these cases concluded that it was unconstitutional for public school teachers to provide teaching services on the premises of pervasively sectarian elementary and secondary schools. Of course, both *Aguilar* and *Grand Rapids* were premised on this Court's holding in *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977). As recently as last term, this Court in *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462 (1993), took pains to distinguish the facts in *Zobrest* from those in *Meek* and *Grand Rapids*. *Zobrest*, 113 S. Ct. at 2468. This Court found that "the programs in *Meek* and *Ball* -- through direct grants of government aid -- relieved sectarian schools of costs they otherwise would have borne in educating their students." *Id.* at 2468. In discussing the *Grand Rapids* decision, this Court said:

The programs challenged there, which provided teachers in addition to instructional equipment and material, "in effect subsidize[d] the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." [Citation omitted.] "This kind of direct aid," we determined, "is indistinguishable from the provision of a direct cash subsidy to the religious school." [Citation omitted.]

Id. at 2468.

The precise factual issues before this Court, of course, are substantially different from those previously decided in *Felton* and *Ball*. As Justice Souter recently indicated in *Lukumi*, 113 S. Ct. at 2247, the Court should refrain from announcing any radical departure from settled law unless it has been subject to "full dress argument." "Sound judicial decisionmaking requires 'both a vigorous prosecution and a vigorous defense' of the issues in dispute."

Amicus U.S. Catholic Conference acknowledges that there are cases now in litigation which squarely focus upon the *Meek*, *Wolman*, *Felton*, and *Ball* line of decisions by this Court, such as: *Walker v. San Francisco Unified School Dist.*, No. 92-15977 (9th Cir. filed May 21, 1992), awaiting decision by the Ninth Circuit; and *Helms v. Cody*, No. 85-5533 (E.D. La. filed December 2, 1985), awaiting decision in the district court.⁵ This Court should await any

⁵The U.S. Catholic Conference mistakenly contends that *Helms v. Cody* is awaiting decision on cross-motions for summary judgment. To the contrary, there was a six-week trial on the merits with live testimony by numerous witnesses on behalf of both the plaintiffs and defendants with hundreds of pages of documentary evidence presented in the case. In the on-premises special education program, which was one of the programs under attack in *Helms*, the public school district entered into contracts with ten selected parochial schools assigning full-time special education teachers to teach the full range of secular subjects in self-contained classrooms. Several of the special education teachers providing on-premises instruction in these parochial schools were previously employed by the parochial school as regular classroom teachers. The students are enrolled as tuition-paying students in the parochial school receiving practically all classroom instruction other than religious instruction from the tax-

reconsideration of *Meek*, *Wolman*, *Felton*, or *Ball* until such time as a case specifically raising the on-premises instruction issue has been presented to the Court and fully briefed by the parties.

Council on Religious Freedom in its amicus brief filed with this Court in *Lee v. Weisman* argued that this Court should not abandon decades of judicial precedent and replace it with a new restrictive and untried test to apply to asserted violations of the non-establishment provisions of the First Amendment (Brf. of Amicus Curiae Council on Religious Freedom before this Court in *Lee v. Weisman* at 28-30). Attached as "Appendix A" to Council on Religious Freedom's amicus brief in *Weisman* was a comprehensive listing of hundreds of federal and state court decisions applying the *Lemon* test in Establishment Clause cases. Also included in "Appendix B" was a list of cases applying Justice O'Connor's helpful endorsement analysis. Council on Religious Freedom pointed out that revisiting all of the issues addressed in the cases decided under *Lemon* would add a tremendous burden to an already overburdened judicial system.

Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 688-94 (1984), suggested a modification of the *Lemon* test to include an endorsement analysis which she articulated as follows:

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of

supported public school teachers.

endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Id. at 690.

In *Wallace v. Jaffree*, 472 U.S. at 69, Justice O'Connor explained that "[t]he endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect." The endorsement analysis found its way into the majority opinion in *Wallace*, 472 U.S. at 56, wherein the Court stated that "[i]n applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'"

Justice Souter joined by Justice Stevens and Justice O'Connor in a concurring opinion in *Lee v. Weisman* specifically rejected the view pressed by numerous amici supporting petitioners that the Establishment Clause should be essentially restricted to a "coercion" analysis. *Lee v. Weisman*, 112 S. Ct. at 2671. They concluded that "we could not adopt that reading without abandoning our settled law, a course that . . . the text of the Clause would not readily permit. Nor does the extratextual evidence of original meaning stand so unequivocally at odds with the textual premise inherent in existing precedent that we should fundamentally reconsider our course." *Id.* at 2671. Certainly there is nothing in this case that requires such a reconsideration.

CONCLUSION

For the above-stated reasons, the judgment of the Court of Appeals of the State of New York should be

affirmed.

Dated: February 23, 1994

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Nos. 93-517, 93-527, 93-539

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

**BOARD OF EDUCATION OF THE KIRYAS JOEL
VILLAGE SCHOOL DISTRICT, et al.,**

Petitioners,

v.

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

**On Writ of Certiorari to the
New York Court of Appeals**

**BRIEF AMICUS CURIAE OF THE GENERAL
COUNCIL ON FINANCE AND ADMINISTRATION
OF THE UNITED METHODIST CHURCH
IN SUPPORT OF RESPONDENTS**

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Nos. 93-517, 93-527, 93-539

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

**BOARD OF EDUCATION OF THE KIRYAS JOEL
VILLAGE SCHOOL DISTRICT, et al.,**

Petitioners,

v.

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

**On Writ of Certiorari to the
New York Court of Appeals**

**BRIEF AMICUS CURIAE OF THE GENERAL
COUNCIL ON FINANCE AND ADMINISTRATION
OF THE UNITED METHODIST CHURCH
IN SUPPORT OF RESPONDENTS**

I. INTEREST OF AMICUS CURIAE

The GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH ("GCFA" or "Amicus") an Illinois non-profit corporation, is the central fiscal agency of the denomination and has among its responsibilities the safeguarding of legal interests of the United Methodist Church, an international

protestant religious denomination with approximately 9.7 million members and 42,500 local churches.¹

For the reasons hereinafter stated, GCFA submits that New York's Chapter 748 amounts to an extraordinary governmental endorsement of a religious sect and thus, represents a classic affront to the Establishment Clause. GCFA's concerns, however, go beyond the four corners of the case below. Although this Court as recently as 1992² declined invitations to overrule or qualify the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which has served as the central sign-post of Establishment Clause jurisprudence for 23 years, there is a growing perception that such a step may now be imminent. Indeed, several religious amici view this case as a fulcrum for change and have urged such a course. With due respect to those fellow communions, GCFA submits that abandonment or erosion of *Lemon* would be an error which ultimately would work against the interests of all religious faiths—interests which the First Amendment was created to protect. It thus urges that the decision of the New York Court of Appeals be affirmed; also, that this Court decline, once again, to overrule or modify *Lemon*.

GCFA's position that the interests of religion are best served by adherence to the *Lemon* principles stems from United Methodist tenets and traditions. Since Revolutionary times, these have included a keen distrust of excessive ties between church and state, even where the same are portrayed as benign or accommodative in their purpose.

¹ Filed with this brief amicus curiae are the consents of counsel for the parties pursuant to the Rules of the Court.

² *Lee v. Weisman*, 505 U.S. ___, 120 L.Ed.2d 467, 480 (1992).

Paragraph 74 of the *Book of Discipline* of the United Methodist Church (1992), which contains the constitution, social principles and basic legislation of United Methodism as expressed by its highest judicatory, the General Conference, states, in pertinent part:

“We believe that the state should not attempt to control the Church, nor should the Church seek to dominate the state. ‘Separation of church and state’ means no organic union of the two, but does permit interaction. The Church should continually exert a strong ethical influence upon the state, supporting policies and programs deemed to be just and compassionate and opposing policies and programs which are not.”

* * *

“[In respect to education] . . . we endorse public policies which ensure access and choice and which do not create unconstitutional entanglements between Church and state. The state should not use its authority to inculcate particular religious beliefs (including atheism) nor should it require prayer or worship in the public schools, but should leave students free to practice their own religious convictions.”

The *Book of Discipline* of the United Methodist Church at sub-pars. B, D.

While United Methodism does not maintain a system of parochial schools, various units of the denomination own, sponsor or maintain religious affiliations with a large number of educational institutions, including schools of theology, colleges and universities, junior colleges and secondary or preparatory schools. Numerous local entities, at their discretion, operate their own nursery, elementary and primary education facilities.

The denomination’s involvement in these educational programs at all levels does not, however, mean that there is ambivalence regarding financial aid issues and the proper role of government:

“[United Methodists] . . . do not support the expansion or the strengthening of private schools with public funds. Furthermore, we oppose the establishment or strengthening of private schools that jeopardize the public school system or thwart valid public policy.

“We specifically oppose tuition tax credits or any other mechanism which directly or indirectly allows government funds to support religious schools at the primary or secondary levels. Persons of one particular faith should be free to use their own funds to strengthen the belief system of their particular religious group. But they should not expect all taxpayers, including those who adhere to other religious belief systems, to provide funds to teach religious views with which they do not agree. . . .”

The *Book of Resolutions* of the United Methodist Church (1992) at 469.

II. SUMMARY OF ARGUMENT

Chapter 748, in essence, was a legislative decision ceding administrative and political authority over a school district to a religious group. Few measures can be imagined which would so frontally conflict with the Establishment Clause. The Court below properly applied *Lemon* analysis in concluding that the wall of separation of church and state had been breached. Such a conclusion is reinforced by cases of this Court condemning arrangements whereby governmental power is delegated to churches. The decision below must be affirmed.

A second issue of far-reaching importance is this: whether *Lemon* will be reformulated or overruled. Although criticism of *Lemon* seems to be in vogue among a number of judges, parties, amici and commentators, the chorus of

requests to cast aside this long-standing rule in favor of some other approach must be resisted. *Lemon* is a faithful statement of the core of the Establishment Clause. While it is unsurprising that courts have encountered difficulties in applying the rule in a profusion of constantly shifting factual situations, this does not render the rule bad law or deserving of replacement. Overall, this Court's vigilant upholding of the Establishment Clause through use of the *Lemon* protocols has served this nation—and religious institutions—quite well. As our founding fathers wisely foresaw, the best policy is one which rigorously curbs governmental power over religion and religious power over government as well.

III. ARGUMENT

A. The Decision Below Should Be Affirmed To Remedy A Patent Violation Of The Establishment Clause.

The decision of the New York Court of Appeals was correct, both in its utilization of the *Lemon* test and in its conclusion that the legislature's action was a clear-cut violation of the Establishment Clause. The dominant purpose of Chapter 748 in carving out a public school district coterminous with—and controlled by—the Satmar Hasidic enclave was to submit to the latter's long standing demand—engendered by the customs and precepts of their religion—that they remain separate from the larger society. Thus, the legislation offended the first prong of *Lemon* which insists that “a secular purpose” be present.

Likewise, by granting the Satmar a public school district of their own, subject to the control of their religious authorities, Chapter 748 violated *Lemon*'s second prong, which insists that a measure not have the “primary effect” of advancing religion. This Court has traditionally

maintained a higher level of scrutiny in applying the second prong of the *Lemon* test where, as here, the government's accommodations to a religious sect relate to the education of children. *Edwards v. Aguillard*, 482 U.S. 578, 96 L.Ed.2d 510, 519, 107 S.Ct. 2573 (1987); *McCollum v. Board of Education*, 333 U.S. 203, 227, 231, 92 L.Ed. 649, 69 S.Ct. 461 (1948). While the potential for excessive governmental entanglement with religion (*Lemon*'s third prong) is also present, this factor was not relied upon by the court below, nor need it be examined here to warrant affirmance.

What GCFA finds truly startling about Chapter 748 is the fact that it actually goes so far as to turn over the reins of government to a religious society. This was apparently done by governmental officials to secure peace after a period of rancor and litigation over the Satmar community's insistence that already available public services for its disabled children be specially provided in a Satmar-controlled separate environment. That background, however, does not alter the significance of what was done: allowing a church to exercise governmental powers for its own ends.

While affirmance of the decision below is amply justified on the basis of *Lemon* analysis alone, the transfer-of-powers aspect of this case brings it within the scope of other decisions of this Court which pointedly condemn such a practice. In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 74 L.Ed.2d 297 (1982), this Court struck down a Massachusetts statute delegating to churches the governmental power to veto applications for liquor licenses in close proximity to religious facilities. After applying the *Lemon* analysis, the Court determined that this was an unconstitutional fusion of governmental and religious functions, saying:

“[The statute] . . . substitutes the unilateral and absolute power of a church for the reasoned decision-making of a public legislative body. . . . The challenged statute thus enmeshes churches in the processes of government and creates the danger of ‘political fragmentation and divisiveness on religious lines,’ [citation omitted]. Ordinary human experience and a long line of cases teach that *few entanglements could be more offensive to the spirit of the Constitution.*”

459 U.S. at 127 (emphasis added).

To the same effect, see *Walz v. Tax Commissioner of the City of New York*, 397 U.S. 604, 668, 25 L.Ed.2d 697 (1970) (Establishment Clause prohibits “sponsorship, financial support, and active involvement of the sovereign in religious activity”).

Finally, Petitioners seek to portray the State’s ceding of secular authority in Chapter 748 as a constitutionally permissible accommodation of religion. (Pet. Br. at 40) There are at least two flaws in this position: First, it is inconsistent with other positions taken in the same brief. Petitioners have repeatedly denied that the Satmar’s request for a separate educational program was a function of the group’s religious beliefs and practices, characterizing the request as an outgrowth of “cultural” traditions (Pet. Br. at 4, n.1 and 29). If this is so, there is no occasion for invoking a religious accommodation as Petitioners do later in their brief (*Id.* at 40).

The second flaw is that Petitioners misapprehend the scope of those accommodations which this Court, on occasion, has sanctioned as mandatory under the Free Exercise Clause or as incidental, and thus permissible, under the Establishment Clause. Heretofore, it has been settled

that governmental accommodation, to be constitutional, must lift an identifiable burden on religious practice initially imposed by the government itself. *See, e.g., Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981). Thus, such permissible accommodations normally take the form of an exemption from laws of general applicability. *E.g., Corporation of Presiding Bishops of the Church of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). This burden-lifting characteristic of true accommodations cannot reasonably be equated with Chapter 748, whose whole purpose was to structure a special school district and affirmatively grant governmental power to a religious society.

B. The *Lemon* Rule Is Constitutionally Correct And Must Be Preserved.

An even larger question surrounding this case is whether *Lemon* will be permitted to remain intact. GCFA asserts that it should, and indeed it must, because only *Lemon*, among all the rules formulated by this Court to-date in the religious area, fully mirrors and upholds all the core principles of the Establishment Clause. Contrary to the assertions of some amici, the Court's interpretation of that clause, as construed in tandem with the Free Exercise Clause, has *not* been hostile to religion. Fairly viewed, it has been protective of religion and religious organizations have an interest in ensuring that the Court's interpretation of the Clause is rigorously upheld. The temptation by some amici to loosen or do away with the strictures of *Lemon* is not without its dangers: such a course might bring short-term advantages in the form of enhanced governmental "accommodations" but in the long-term and as more fully set forth below, it could lead to unwelcome consequences.

1. *Lemon* Accurately Expresses The Essential Message Of The Establishment Clause.

Given the frequency of denunciations leveled at the *Lemon* rule in recent years,³ it would be instructive at the outset to closely compare the *Lemon* test with the actual language of the Establishment Clause. Presumably, such a comparison would reveal how it is that *Lemon*, according to its critics, has strayed so far off course. Such an inspection yields no such result. The Clause is terse, yet eloquent in its simplicity: "Congress shall make no law respecting an establishment of religion . . ." If this language means anything, it is that the role of government in our system is to make laws about predominantly *secular* matters—not religious ones. See *Allegheny County v. ACLU*, 492 U.S. 573, 610 (1989) (Constitution mandates that "government remain secular, rather than affiliate itself with religious beliefs and institutions"). As Justice Jackson put it in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943):

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

Religion was one of these subjects; in fact, it was the first one specified in the Bill of Rights. A comparison of the three *Lemon* elements with the constitutional lan-

³ See, for example, assaillment of the New York Court's use of *Lemon* as "Orwellian" and "deeply flawed" (Joint Br. of Christian Legal Society et al. at 2, 5). In his concurring opinion in *Lamb's Chapel v. Center Moriches*, 508 U.S. ___, 124 L.Ed.2d 352, 365 (1993), Justice Scalia has likened *Lemon* to a "... ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried ... [and] stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys"

guage hardly supports the thesis that *Lemon* has strayed. To the contrary, *Lemon* is not only harmonious with the constitutional mandate—it is the very embodiment of it. If legislating in the religious realm is forbidden, surely it logically follows that *Lemon* would begin with a requirement that “a secular legislative purpose” be present. 403 U.S. at 612. Nor should it come as any surprise, under the second prong of the *Lemon* test, that the “principle or primary effect neither advances nor inhibits religion.” *Id.* Finally, the third prong of the test’s preclusion of “excessive government entanglement with religion” is hardly antithetical to the Establishment Clause’s basic command. 403 U.S. at 613. In sum, *Lemon* is faithful to the Constitution. It would be impossible to conjure up a comprehensive test which more faithfully captures and implements the intent of the Framers.

2. *Lemon* Principles, Though Complex As Applied, Are Still Workable And Widely Understood.

No constitutional doctrine as thoughtfully fashioned as *Lemon* should be casually discarded. As Chief Justice Burger observed in announcing the *Lemon* test, it represents “the cumulative criteria developed by the court over many years.” *Lemon*, 403 U.S. at 612. Perhaps because *Lemon* represents a distillation of the composite wisdom of several generations of distinguished justices, the rule is far better understood and commands more respect among bench, bar and public officials than some commentators are willing to acknowledge. *Lemon*, in fact, is “a convenient formulation of the ‘cumulative criteria developed by the court over many years,’ ” and is but “an elaboration of the fundamental rule that government be neutral with respect to religion.” Laycock, “*Non-Coercive*” *Support For Religion: Another False Claim About The Establishment Clause*, 26 Val. U. L. Rev. 37, 53-54 (1991).

At a time when many simplistic, single-purpose rules are being proposed to take *Lemon*'s place, it is also relevant to consider that *Lemon* has the virtue of being comprehensive and resilient in its operation. History has shown that the range of situations which threaten encroachment on the Establishment Clause is almost boundless. *Lemon* can be adapted to all such situations, whether subtle or extreme. Single-subject tests lack that advantage. As Justice O'Connor stated in *Allegheny County v. ACLU*, 492 U.S. 573 (1989):

"An Establishment Clause standard that prohibits only 'coercive' practices or overt efforts at government proselytization [citations omitted] but fails to take account of numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of its approval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community."

492 U.S. at 627-628 (O'Connor, J., concurring).

Subtle distinctions, leading to judicial frustration and even occasional contradictions, have indeed occurred under *Lemon*, but this is to be expected with any important rule that comes into play in a vast proliferation of cases. GCFA suggests these drawbacks are relatively small compared to the implications of operating without *Lemon* or under a hastily constructed substitute. In short, *Lemon* should be retained because (1) it is a correct statement of the law; and (2) its main features (nuances of application notwithstanding) are widely understood and followed.⁴

⁴ For example, the Westlaw databases reflect that to-date, 745 federal cases have discussed or cited *Lemon*; in addition, 368 state appellate decisions have adverted to the rule. From a *stare decisis* perspective alone, predictability and protection of generated expectations are at stake in this case. Sound policy counsels against the elimination of a rule so deeply entrenched in our jurisprudence.

3. *Lemon's Requirement Of Neutrality Is Not Inhospitable To Religion.*

Neither is *Lemon* hostile to religion, as some have asserted (e.g., S. Baptist Amicus Br. at 11). In fact, *Lemon* and its progeny, construed in conjunction with Free Exercise jurisprudence, have provided an environment in which religion can and does flourish.⁵ An examination of the current legal climate negates such claims of “secularism” and “animosity.” First, there is already in place a body of Free Exercise jurisprudence which collectively constitutes a strong barrier against state burdens and encroachments upon religious practice. See *Sherbert v. Verner*, 374 U.S. 398 (1963); and *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“Only those [state] interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion”). Most recently, this barrier was reaffirmed and significantly strengthened by passage of the Religious Freedom Restoration Act of 1993 (“RFRA”), 42 U.S.C. 2000 bb *et seq.* (1993) (“compelling interest” must be demonstrated before government can substantially burden religious practice; private right of action is conferred).

Second, contrary to the claims of some, *Lemon* does not prevent reasonable accommodations. Both the so-called “mandatory” accommodations dictated by the Free Exercise Clause and the incidental accommodations which do

⁵ According to successive editions of the *Yearbook of American Churches*, church membership in those communions affiliated with the National Council of Churches in the United States during the *Lemon* era (1972 to-date) has increased from 42,763,297 to 48,925,442, or approximately 14.5%. *Yearbook of American Churches*, pp. 195-196 (1970); *Yearbook of American and Canadian Churches*, pp. 261-63 (1993).

not rise to the level of “primarily advancing” religion (*Lemon*’s second prong) are permissible.⁶

This amicus believes that only those who fail to appreciate the importance to all—including churches—of governmental neutrality would flirt with changing the essentially benign constitutional standards which now exist and which accord churches ample room to carry out their missions. Churches need to be reminded that the principles embodied in *Lemon* are not anti-religious; to the contrary, they guarantee religious independence and vitality by guarding against “state-created orthodoxy.” *Lee v. Weisman*, *supra*, 112 S.Ct. at 2658.

⁶ See e.g., *Bowen v. Kendrick*, 487 U.S. 589, 101 L.Ed.2d 520, 108 S.Ct. 2562 (1988) (Adolescent Family Life Act, which allowed funding for religious entities to provide range of family counseling services, deemed not violative of the Establishment Clause); *Lamb’s Chapel v. Center Moriches*, 508 U.S. —, 113 S.Ct. 2141 (1993) (church had right to exhibit religious film on public school’s premises after school hours); *Wolman v. Walter*, 433 U.S. 229, 247, (1977) (considerations of safety, distance, and the adequacy of accommodations could justify a public school’s provision of remedial services in mobile units located on neutral sites near parochial school’s premises); *Roemer v. Maryland Public Works*, 426 U.S. 736, 49 L.Ed.2d 179, 96 S.Ct. 2337 (1976) (annual subsidies to qualifying colleges and universities, including religiously affiliated institutions, did not violate the Establishment Clause); *Hobbie v. Unemployment Appeals Com’n of Florida*, 480 U.S. 136, 94 L.Ed.2d 190, 107 S.Ct. 1046 (1987) (state’s accommodation of individual’s religious preferences by awarding of unemployment benefits to individual despite refusal by individual to work on her Sabbath deemed not to violate Establishment Clause); *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 97 L.Ed. 2d 273, 107 S.Ct. 2862 (1987) (federal law exempting religious institutions from ban on religious discrimination in employment held not to violate the Establishment Clause).

4. Overruling Or Reformulating *Lemon* Could Leave A Void Or Even Create Affirmatively Harmful Results.

The prospect of altering *Lemon* or replacing it with some untested new formula is most disturbing to GCFA. It is submitted that none of the various substitute rules which have been brought forward would fill the void left by an overruled *Lemon*. As noted earlier, narrow tests like the proposed “coercion” standard are too limited to cover the myriad ways in which the First Amendment might be encroached upon. This deficiency also applies to the “strict scrutiny” approach suggested by Chief Justice Kaye in her concurrence in the decision below at 81 N.Y. 2d 518, 532 *et seq.* While such a standard is superficially appealing, it does not explain why *Lemon* analysis, alone, fails to suffice. Nor does it discuss the implications of the vacuum which would be left if “strict scrutiny” fully displaced, instead of merely supplemented, *Lemon*.

Petitioners have made an outright bid for deletion of *Lemon*’s “secular purpose” and “primary effect” tests “. . . to the extent that they imply that a legislature may not enact laws that remove impediments to religious observers’ equal access to secular governmental benefits” (Pet. Br. at 45). This is pernicious, but not very much more so than the approaches advanced by certain religious amici. For instance, the Southern Baptist Convention, et al., have argued that *Lemon* “feeds confusion” (Br. at 15) and would have this Court replace *Lemon*’s three prongs with a new test containing no fewer than *four* prongs and *seven* subprongs. The confusion likely to be engendered by an abrupt departure from *Lemon* and attempts to follow such a new rule is self-evident.

Likewise, while Professor McConnell and his colleagues in their joint amicus brief on behalf of the Christian Legal

Society, the National Association of Evangelicals, et al., present an earnest and well-argued effort to soften or qualify the second (“primary effect”) test of *Lemon* (Br. at 3-6), this approach, too, has a downside. By de-emphasizing “effects” and allowing challenged actions to pass muster despite their actual impact, so long as they are “formally neutral toward religion (or “religion-blind”)” (*Id.* at 5), those amici overlook the fact that laws facially “neutral” toward religion can actually operate to advance the latter as surely as laws openly and avowedly intended to accomplish such a result.

This Court’s teachings concerning job discrimination and civil rights provide a useful illustration of the defect. For a period of time, employers practicing certain forms of discrimination could avoid accountability by cloaking their actions in “facially neutral employment practices.” In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court, in crafting what has become known as the “disparate impact doctrine” held that a plaintiff need not show intentional discrimination in order to establish a violation. Rather, where a *facially neutral practice*, even if adopted without prohibited intent, has an adverse impact on a protected group, this effect is indistinguishable from an intentional discriminatory practice. To the same effect, see *Watson v. Fort Worth*, 487 U.S. 977, 990 (1988). The same rationale applies here where the issue is governmental dispensation of benefits to religion. A “facial neutrality” requirement may not be adequate because a seemingly neutral enactment may indeed mask even flagrant advancements of religion when its true effects are properly considered.⁷

⁷ In our view, the case of *Employment Division v. Smith*, 494 U.S. 872, 188 L.Ed.2d 876 (1990), erroneously opted for a formal neutrality rationale, the result being a disparate and adverse impact on established religious practice. This approach sparked the enactment of RFRA, the intent of which was to correct this error.

In conclusion, it is appropriate to ask what would replace *Lemon*, if it were overruled or key parts of the rule removed:

(a) If the Court should delete Test 1, the requirement of “a secular purpose,” is this to be taken as meaning that laws may now have a religious purpose?

(b) If the Court should delete Test 2, dealing with “primary effect,” is this to be taken as meaning that laws operating to confer major advantages upon religion are now permitted?

(c) Similar questions would surround deletion of the third *Lemon* prohibition of “entanglement.”

Clearly, *Lemon* is best left alone. Organized religion should not succumb to the short-term lure of a more beneficent, accommodating government. Instead, it should be mindful of its long-term stake in preserving the splendid balance which has been struck through interaction of the Free Exercise and Establishment Clauses and the *Lemon* case. While tinkering with *Lemon* may not bring about sudden and dramatic changes, it could lead to an insidious encroachment process culminating in the eventual union of civil and ecclesiastical forces. Madison spoke of this as the “silent accumulations and encroachments of ecclesiastical bodies” on the newly emerging democratic government. Madison, *Detached Memoranda* (1832). Much more recently, Chief Justice Burger described the dangers of such a gradual, incremental process in the following terms:

“A law ‘respecting’ the . . . establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one ‘respecting’ that end in the sense of being *a step that could lead to such establishment* and hence offend the First Amendment.”

Lemon, 403 U.S. at 612 (emphasis added).

IV. CONCLUSION

For the reasons stated above, the decision of the New York Court of Appeals should be affirmed. In addition, the Court should decline to overrule or modify the *Lemon* doctrine.

Dated: Chicago, Illinois
February 23, 1994

Respectfully submitted,

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IN THE
Supreme Court of the United States

October Term, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL
VILLAGE SCHOOL DISTRICT,

Petitioner,

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[Caption Continued On Inside Cover]

On Petition For A Writ Of Certiorari
To The New York State Court Of Appeals

BRIEF AMICI CURIAE OF THE AMERICAN JEWISH
CONGRESS, NATIONAL JEWISH COMMUNITY RELA-
TIONS ADVISORY COUNCIL, PEOPLE FOR THE
AMERICAN WAY, GENERAL CONFERENCE OF
SEVENTH-DAY ADVENTISTS, AND THE UNION OF
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BOARD OF EDUCATION OF THE MONROE-
WOODBURY CENTRAL SCHOOL DISTRICT,

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THE ATTORNEY GENERAL OF THE
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INTEREST OF THE AMICI

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews. It has taken a particular interest in the Establishment Clause, because in its view the separation of church and state is an indispensable safeguard for the religious liberty of American Jews. Moreover, for reasons more fully stated below, it believes that invalidating the Kiryas Joel district does not confront the Court with a choice between a robust conception of non-establishment and providing Hasidic children with serious handicapping conditions an education at public expense.

* * *

The National Jewish Community Relations Advisory Council (NJCRAC) is an umbrella organization including the following national member organizations: American Jewish Committee, American Jewish Congress, Anti-Defamation League, B'nai



B'rith, Hadassah, Jewish War Veterans of the United States of America, Jewish Labor Committee, National Council of Jewish Women, Union of American Hebrew Congregations, United Synagogue of Conservative Judaism, Women's League for Conservative Judaism, Women's American ORT; as well as 117 community member agencies representing all major Jewish communities in the United States (listed in Appendix A).

As the national planning and coordinating body for the field of Jewish community relations, dedicated to preserving the principles embodied in the Bill of Rights, NJCRAC believes that the separation of church and state is an essential bulwark in maintaining the individual, group, and political equality of all Americans. (The Union of Orthodox Jewish Congregations of America, a NJCRAC member agency, does not join in this brief because of its belief that the Kiryas Joel School District was established for an entirely secular purpose,

constitutes a legitimate accommodation to a religious group, and, consequently, does not violate the Establishment Clause of the First Amendment.)

* * *

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights.

People For has joined in filing this *amicus* brief in order to help vindicate the important First Amendment principles at stake in this case, particularly the fundamental principle of the separation of church and state and the prohibition on

state establishments of religion. As an organization including numerous religious leaders and individuals, People For strongly believes that the creation of the Kiryas Joel School District violates these principles and significantly threatens religious freedom in our country, and that constitutional alternatives are available to provide the children of Kiryas Joel with special education services.

* * *

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. The BJC's members include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship;

National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

* * *

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church, which has more than 7.8 million members worldwide, including some 760,000 in the United States.

The Church believes that Freedom of Conscience includes the right to worship or not to worship, and to profess, practice, and promulgate religious beliefs or to change them. In exercising these rights,

however, it admonishes that government should respect the rights of all citizens, not just those of the majority.

As the surest way of securing full religious liberty, the Seventh-day Adventist Church advocates the separation of church and state commanded by our Lord, who said, "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's" (Matthew 22:21). It believes: "The union of the church with the state, be the degree ever so slight, while it may appear to bring the world nearer to the church, does in reality but bring the church nearer to the world." Ellen G. White, The Great Controversy, p. 264 (1974).

The state should never invade the distinct realm of the church to affect, in any way, freedom of conscience; or the right to profess, practice, and promulgate religious beliefs. Conversely the church must avoid the distinctive realm of the state, even in the furtherance of an otherwise valued, public

purpose. Upon these principles the Seventh-day Adventist Church encourages each branch of government to support a high degree of separation between church and state; and a high level of First Amendment rights for churches and their members as they profess, practice, and promulgate their religious beliefs.

* * *

The Union of American Hebrew Congregations (UAHC) represents 1.5 million Reform Jews in 850 congregations nationwide. For over a century, the UAHC has fought for religious liberty and tolerance, believing these to be among the greatest gifts America has bestowed upon the world. The UAHC has staunchly supported reading the Establishment Clause of the First Amendment of the United States Constitution as constructing a wall of separation between church and state, and believes this wall has been crucial to the freedom we, as a religious minority, have enjoyed in this country.



STATEMENT OF THE CASE

The *amici* adopt the Respondents' statement of the case.

STATEMENT OF THE FACTS

Amici note that the facts are largely not in dispute, and hence do not provide their own statement of the facts.

SUMMARY OF ARGUMENT

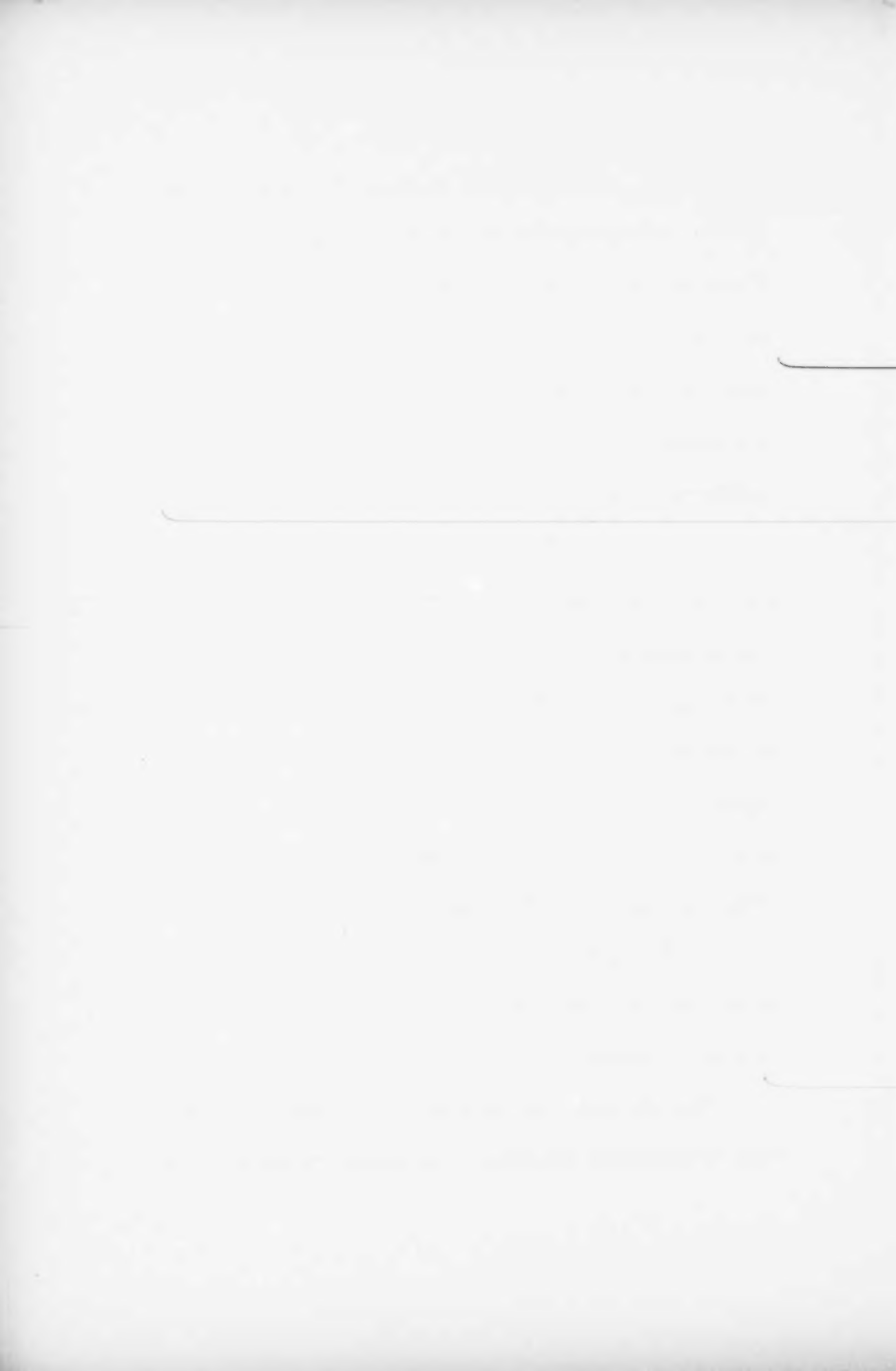
1. The creation of the Kiryas Joel School District (KJSD) presents a scenario unusual for this Court -- an actual combination of church and state. That union of civil and religious power runs afoul of the most fundamental principle of the Establishment Clause. The absence of the abuses historically derivative of established religion cannot alter KJSD's fundamental constitutional shortcoming.

2. *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) is dispositive. There the Court invalidated a church veto over the issuance of liquor licenses because "the statute enmeshed churches in the exercise of

substantial governmental powers contrary to our settled interpretation of the Establishment Clause." There was no evidence in *Larkin* that any church used the statue to further sectarian ends. The defect in that case, as in this one, is the co-joining of politics and religion, of creating political constituencies along religious lines.

3. The *Larkin* holding was firmly rooted in history. The goal of most fully established churches was to ensure that the entire polity shared the same faith, either by coerced conversions of religious minorities, expulsion of religious minorities, or, especially in colonial America, creation of new political jurisdictions founded and organized on religious lines. The Founders were well aware of this feature of establishments; it is at the very core of what they determined, through the Establishment Clause, to forbid.

The abuses that modern Americans associate with established religions -- compulsory taxation or



chapel attendance, prosecution of heretics and blasphemers, official control of church doctrine and liturgy, expulsion of non-believers from the political society are not independent of this principle of identifying church with state. Rather, they are derivative of it, flowing naturally from the fundamental assumption that both church and the state have a mutual interest in furthering a common agenda.

4. The established churches of medieval Europe, reformation England and post-reformation Europe all shared a political theory which emphasized the unity of religion and state. Thus, for example, the European principle of *cuius regio, eius religio*, and the commonlaw prosecution of heresy and blasphemy both proceed under this assumption.

5. Several American colonies, such as Massachusetts and Connecticut were organized along religious lines. Elsewhere, "in the minds of royal governors, religious and political centralization blended into a picture of social order that must be

imposed on the colonies." The franchise was limited on the basis of religion.

6. The Constitution was drafted with preventing both the multiple establishment in existence and the earlier forms in which church and state overlapped. The no-religious-tests clause broke this identification of church and state, and the First Amendment carried that break still further. Subsequent events confirm that the First Amendment was designed to prevent the creation of political jurisdictions defined by religion.

7. Despite the nominal secular nature of the school district, the underlying facts make clear that the sole organizing principle of this District is religion. This deliberate religious gerrymander is as unconstitutional as the racial gerrymander condemned in *Brown v. Board of Education*, 344 U.S. 1 (1954).

8. *Lemon* (which as the Court of Appeals correctly held, invalidates KJSD) should not be reconsidered. No special circumstances are shown to

justify a departure from *stare decisis*. *Lemon* is not unworkable, and surely not more so than any other test would be in this difficult area of the law. Petitioners' complaint is with the Establishment Clause, not any particular test. Moreover, *Lemon* itself was solidly rooted in prior cases, including *Walz v. Tax Comm'n*, 397 U.S. 644 (1970), the case Petitioners say lays out the correct constitutional standard. By virtue of repeated adjudication *Lemon* has become an integral part of the law. Moreover, recent historical studies demonstrate that *Lemon* and its predecessors correctly understood constitutional history.

9. *Lemon* is not inconsistent with the principle of accommodation. However, KJSD is not an accommodation because it neither lifts any state imposed burden from the shoulders of Hasidic children and because, by creating a political constituency along religious lines, it cuts at the very core of the Establishment Clause. However the tension between

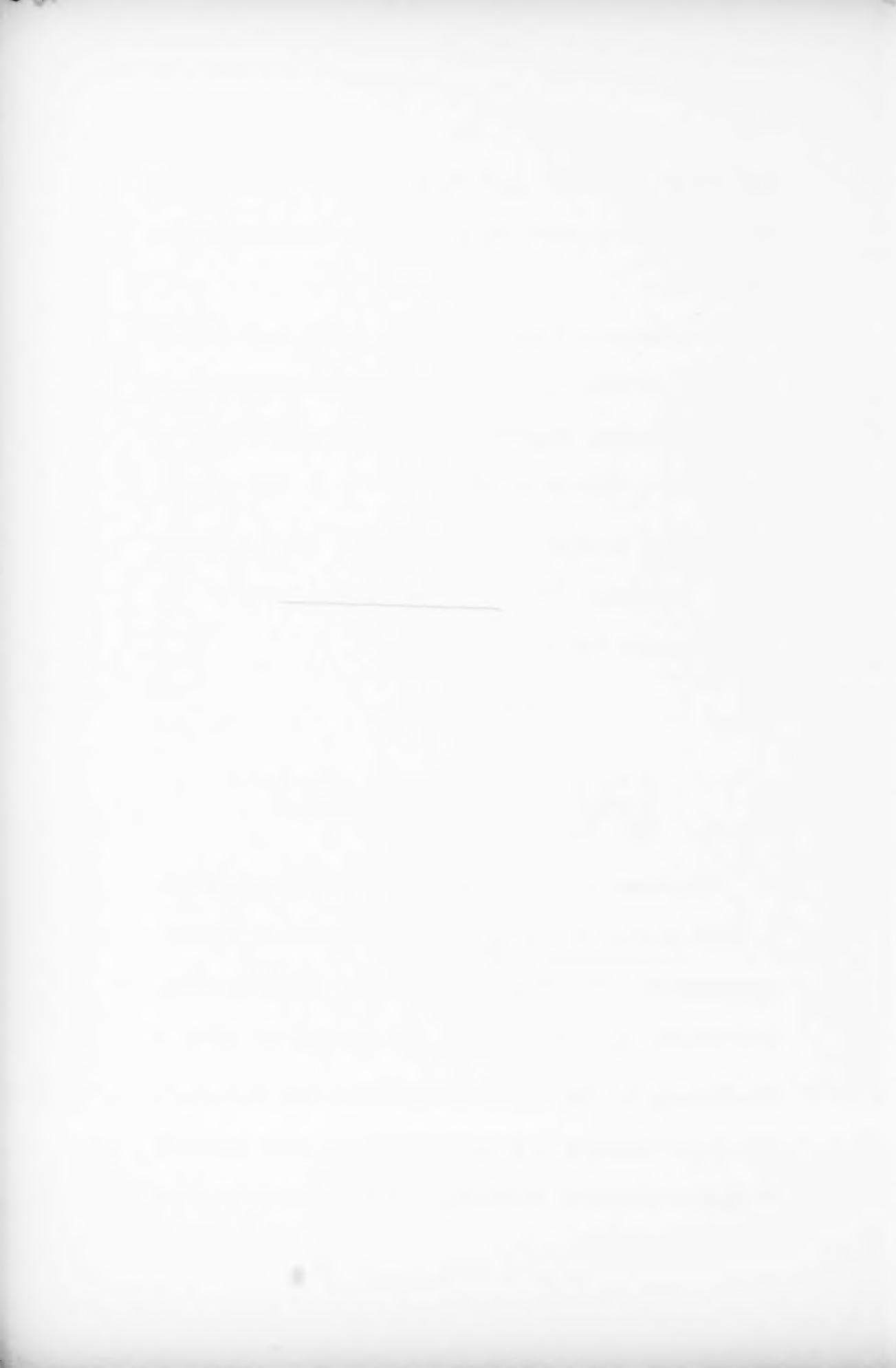
the Free Exercise and Establishment Clauses is reconciled, the core value of each Clause must be preserved.

10. Monroe-Woodbury could have, and should now be ordered to, provide special services to disabled Hasidic children on "neutral sites" such as condoned in *Wolman v. Walter*, 433 U.S. 229 (1977). Such sites neither create political constituencies along religious lines nor otherwise violate the Establishment Clause.

ARGUMENT

I A UNION OF RELIGIOUS AND CIVIL POWER UNCONSTITUTIONALLY ESTABLISHES RELIGION

This case is about formally establishing religion, a real unity of religious and political power. Confronted with this paradigmatic establishment, Petitioners and their *amici* are forced to offer a conflicting hodgepodge of arguments for reversal. Thus, for example, though Petitioners deny that any religious mandate prohibits Hasidic children from



mixing with their non-Hasidic peers, they nevertheless insist that the separate school district is an accommodation of Hasidic religious practice.

Petitioners Kiryas Joel School District ("KJSD") and Monroe-Woodbury School District, joined by many of their *amici*, also call for an overturning of the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). They claim that *Lemon* is historically unfounded, unworkable and leaves in doubt the constitutionality of what are termed, in *ipse dixit* fashion, 'permissible accommodations' [Petitioner Kiryas Joel Brief at 43-45; Petitioner Monroe-Woodbury Brief at 47-79].¹ By whatever tortious route they travel, Petitioners' case rests on the claim that the sole test of whether this case involves an establishment is whether religious instruction takes place in the KJSD.

1. Significantly, Petitioner New York State does not join in this call.

Petitioners hold a myopic view of this case. In the first place, as we will demonstrate in Point VI, *infra*, the claim that affirmance would leave these vulnerable children without special educational services is simply incorrect. There are constitutional alternatives available with which to provide services to these children consistent with their religious practices; specifically the use of neutral sites, *Wolman v. Walter*, 433 U.S. 229 (1977). New York did not need to create -- and could not constitutionally create -- a public school district coincident with a religious community in order to provide these services. New York could have required Monroe-Woodbury to implement one of those constitutional alternatives.

KJSD is not a run-of-the-mill Establishment Clause violation. This unusual case presents this Court with a legal problem it has not often confronted -- an actual union of church and state. It has not confronted it, not because it is a new problem



or one that arises from an unforeseen intersection of conflicting lines of authority, but because it involves an old principle, one so old and so plainly settled, and so fundamental to the organization of the political life in the United States for over two centuries, that it is rarely questioned. The dearth of case law invoking this principle is as significant as is the absence of decisions barring the rack and screw to the interpretation of the Eighth Amendment.

KJSD purports to be a secular school district. But KJSD (which offers no regular public school instruction) is, and was intended to be, something quite different. It is a political subdivision coterminous with a religious community. It is the political embodiment of that religious community. It is literally an establishment of religion whether or not any of the abuses commonly associated with establishments are present.²

2. In this facial challenge, plaintiffs have not yet had an opportunity to prove whether KJSD engages in any of the practices that historically accompany establishments.

Petitioners confuse the absence of those abuses that historically are symptomatic of established religion with the disease itself -- the joining of religion and political power. KJSD argues that the absence of symptoms proves the absence of the disease. That claim is no more valid under the Establishment Clause than in medicine.

Larkin v. Grendel's Den, 459 U.S. 116 (1982), is dispositive. In that case, Massachusetts allowed churches to veto the granting of a liquor license sought to be located within a specified distance of a church. The constitutional defect was not in protecting churches from the untoward behavior often associated with liquor sales, but the way in which the state accomplished that end. Massachusetts unconstitutionally conferred political power on churches by granting them the unreviewable discretion to decide whether or not to veto a particular liquor license.

Chief Justice Burger explained for the Court:
"This statute enmeshes churches in the exercise of

substantial governmental powers contrary to our settled interpretation of the Establishment Clause."

And he continued:

Our contemporary views do no more than reflect views approved by the Court more than a century ago: 'The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.'" [citations omitted]

459 U.S. at 126.³

Justice O'Connor expressed a similar idea when she explained in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (concurring opinion), that one of the purposes of the Establishment Clause was to proscribe a state from choosing to "foster the creation of political constituencies along religious lines."

There was no evidence in *Larkin* that any church had used its powers to further religious beliefs. The

3. In subsequent cases, *Larkin* has come to stand for the proposition that government may not delegate political power to religious entities. *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 591 (1989); *Hernandez v. C.I.R.*, 490 U.S. 680, 697 (1989). New York has done just that by creating KJSD.

fatal constitutional defect in that case was the co-joining of political power with religious prerogatives and creating political constituencies along religious lines, exactly the defect inherent in the creation of KJSD, except that the power conferred, and hence the constitutional violation, is greater here.

The only difference between *Larkin* and this case is that here the legislature sanitized the statute of references to religion. That does not change the substance of what has been accomplished, see Point IV, *infra*, nor should it obscure the magnitude of the constitutional violation. What is true of the Fourteenth and Fifteenth Amendments is no less true of the First. The Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960), citing *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

This Court, for example, was unanimous in invalidating a facially neutral anti-ritual slaughter ordinance, holding that in fact it was motivated by

anti-religious animus. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S.Ct. 2217 (1993). The First Amendment, this Court said, "protects against government hostility which is masked as well as overt" *Id.* at 2227, for "it is inconceivable that the guarantees embedded in the Constitution of the United States may be manipulated out of existence," *Gomillion v. Lightfoot*, *supra*, quoting *Frost & Frost Trucking Co. v. Railway Comm'r*, 271 U.S. 583, 594 (1926), by mere cleverness in drafting.

II
THE ACTUAL EXERCISE OF POLITICAL
POWER BY RELIGION WAS ONE OF THE
HISTORIC EVILS AT WHICH THE
ESTABLISHMENT CLAUSE WAS AIMED

The *Larkin* holding was anchored in history:

At the time of the Revolution, Americans feared not only a denial of religious freedom, but also the danger of political oppression through a union of civil and ecclesiastical control.

459 U.S. at 127, n.10.

That history, it is settled, has a particular significance for interpreting the First Amendment. *PEARL v. Nyquist*, 413 U.S. 756, 770-73; *Everson v. Bd. of Educ.*, 330 U.S. 1, 14-15 (1947); *Edwards v. Aguillard*, 482 U.S. 578, 606 (1987) (Powell, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

The established religions with which the Founders were familiar were premised on an alignment between the political and religious orders. It was to avoid a repetition of the lachrymose history of two hundred years of wars and persecutions in England and on the Continent that the First Amendment was adopted.

The goal of most fully established churches was to ensure that the entire polity shared the same faith, either by coerced conversions of religious minorities, expulsion of religious minorities, or, especially in colonial America, creation of new political jurisdictions founded and organized on religious lines.

The Founders were well aware of this feature of establishments; it is at the very core of what they determined, through the Establishment Clause, to forbid.

In this century, of course, the full alignment of religion with government is rare. Indeed, Justice Powell went as far as to say:

[a]t this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of rights. . . . The risk of significant religious or denominational control over our democratic processes -- or even of deep political division along religious lines -- is remote . . . [citations omitted]

Wolman v. Walter, *supra*, 433 U.S. at 263 (Powell, J., concurring); *Mueller v. Allen*, 463 U.S. 388, 400 (1983). This case, however, presents not the risk, but the actuality of what Justice Powell termed "significant religious control over our democratic processes." It is accordingly not necessary to apply *Lemon* to know that legislation cloaking a designated church with political power is unconstitutional, or

that coerced participation in religious exercises will not pass constitutional scrutiny. *Lee v. Weisman*, 112 S.Ct. 2649 (1992).

A. A Brief History of Establishments

1. Theory

The fundamental idea behind established religion is that the religious polity should and must be identical with the political one. This idea is of ancient lineage. Locke attributed it to the biblical Hebrews. J. Locke, A Letter On Toleration (Prometheus Books 1990) at 51-54.

Established religion addresses a fundamental problem of political organization: how to bind together in an effective common social bond individuals who, left alone, will pursue their own autonomous agendas and interests? A shared religion is one candidate for use as a means of social organization. Religion addresses a broad range of issues, including the ultimate goods and goals of life. Religious beliefs are deeply held and influence behavior. The fear of offending God is a powerful

inducement for compliance with socially necessary rules.⁴

The abuses that modern Americans properly associate with established religions -- compulsory taxation or chapel attendance, prosecution of heretics and blasphemers, official control of church doctrine and liturgy, expulsion of non-believers from the political society, such as the expulsion of the Jews from Spain or the Huguenots from France -- are not independent of this principle of identifying church with state. Rather, they are derivative of it, flowing

4. For those religions that assert a special claim on truth, the combination of church and state is also entirely logical. Why should not the society function on the basis of God's revealed truth instead of stumbling along, groping for the best way to regulate human affairs, when God has laid it out in the Bible, Koran, or other sacred scripture? Following the dictates of revealed truth avoids communal sin and calling down God's wrath on the community.

At least some religions assert that they are divinely commanded to attend to the social order, which necessarily includes political affairs. Yet other religions are explicitly national in character, such that the political unit is defined by allegiances to national gods. The United States has not escaped this last phenomenon by any means; American literature is full of references to God's special role for America, or America as God's chosen instrument. See G.M. Marsden, Fundamentalism and American Culture, 11-21 (1980).

naturally from the fundamental assumption that both church and the state have a mutual interest in furthering a common agenda.

2. Continental Establishments
a. Pre-Reformation

Those who thought about theological and political issues over the course of hundreds of years -- Aristotle, St. Augustine, Thomas Aquinas, Calvin and Luther -- all struggled with the respective role of church and state.⁵ These discussions differed greatly on how to adjust relations between the two, with some, like St. Augustine, insisting on a close partnership between the two. The church and the monarchs of medieval Europe regularly clashed, not over religious liberty, but over who would control the joint enterprise of church and state. See generally, S. Cobb, The Rise of Religious Liberty in America, (reprinted, 1970) at 19-66 (hereafter "Cobb, The Rise").

5. For a general overview, see L. Strauss and J. Cropsey, History of Political Philosophy (3rd. ed. 1987).

b. Post-Reformation

With the Protestant Reformation, a method short of war had to be devised to determine the religious character of the newly emerging states at a time when there was more than one Christian faith from which to choose. The solution that emerged at the Peace of Augsburg of 1555 was that the faith of the state, and of its citizens, would be governed by the faith of the prince, "cuius regio, eius religio," Cobb, The Rise, *supra*, at 48; Cross & Livingston, The Oxford Dictionary of the Christian Church (2nd ed. rev. 1989), p. 108. This settlement again assumed the need for an overlap between the state (embodied in the person of the monarch) and the church, and the social cohesiveness that comes with having a common communal faith.

3. English History

English ecclesiastical history from the time of Henry VIII's reformation is particularly important for an understanding of the religion clauses of the First Amendment. At the very outset, Henry VIII's



Reformation assumed that the government "hath not only charge on the bodies, but also on the souls of his subjects," St. George, Doctor and Students (T. Plunkett & J.L. Barton, eds., Selden Society, 1974), cited in J. Guy, Tudor England (1988) 125-27. The passage of the Supremacy and Treason Acts of 1534 allowed for religious dissenters to be punished as traitors. The period of the English Reformation and its aftermath reflects the assumption that church and state had to work together, that the state had to insist on religious uniformity for its own protection and that of the society. The assumption was that only persons loyal to the religion of the state could be loyal to the state itself. It was this that James I meant when he insisted, "No bishop, no king", L. Levy, Blasphemy (1993) at 96-97.

Dissenting ministers were often accused of sedition when their religious views were inconsistent with the state religion. L. Levy, Blasphemy, *supra*, at 205-15; 235-36; 298-99; 307. Lord Hale explained



this conjunction in upholding landmark heresy prosecution (Taylor's Case, 3 Keble 607, 621):

And . . . such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, State and Government, and therefore punishable in this Court. For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.⁶

The harshness of the English establishment was ultimately softened by the Toleration Act of 1689, but it did not dispel the assumption that political and religious power had to overlap. "The Act of Toleration only recognized the rights of Dissenters to exist. They remained second-class citizens devoid of political rights in a country dominated by Anglicans." T.J. Curry, The First Freedoms: Church and State

6. Even when blasphemy statutes were repealed, such prosecutions (often for what is more properly called heresy) were conducted under the common law on the theory that the expression of heretical views undermined the state's security. 4 Blackstone, 4.1.1; See L.W. Levy, Blasphemy (1993), at 357-358.

In America to the Passage of the First Amendment (1986) at 54 (hereafter, "Curry, First Freedoms").

4. The American Experience

Several American colonies were founded on the assumption that the political community should be organized along religious lines. Massachusetts and Connecticut are the most obvious examples. John Winthrop told the Massachusetts settlers that for their efforts to succeed they must "walk . . . humbly with our God . . . we need be knitt together in this worke as one man", Curry, First Freedoms, *supra*, at

6. As Curry summarizes it, the Massachusetts colonists were "certain that their colonies, in order to prosper, must be united in . . . Truth" as Congregationalism saw it. *Id.* at 5.⁷ Those, like Roger Williams or Anne Hutchinson, who refused to conform, were expelled because they were, in Governor

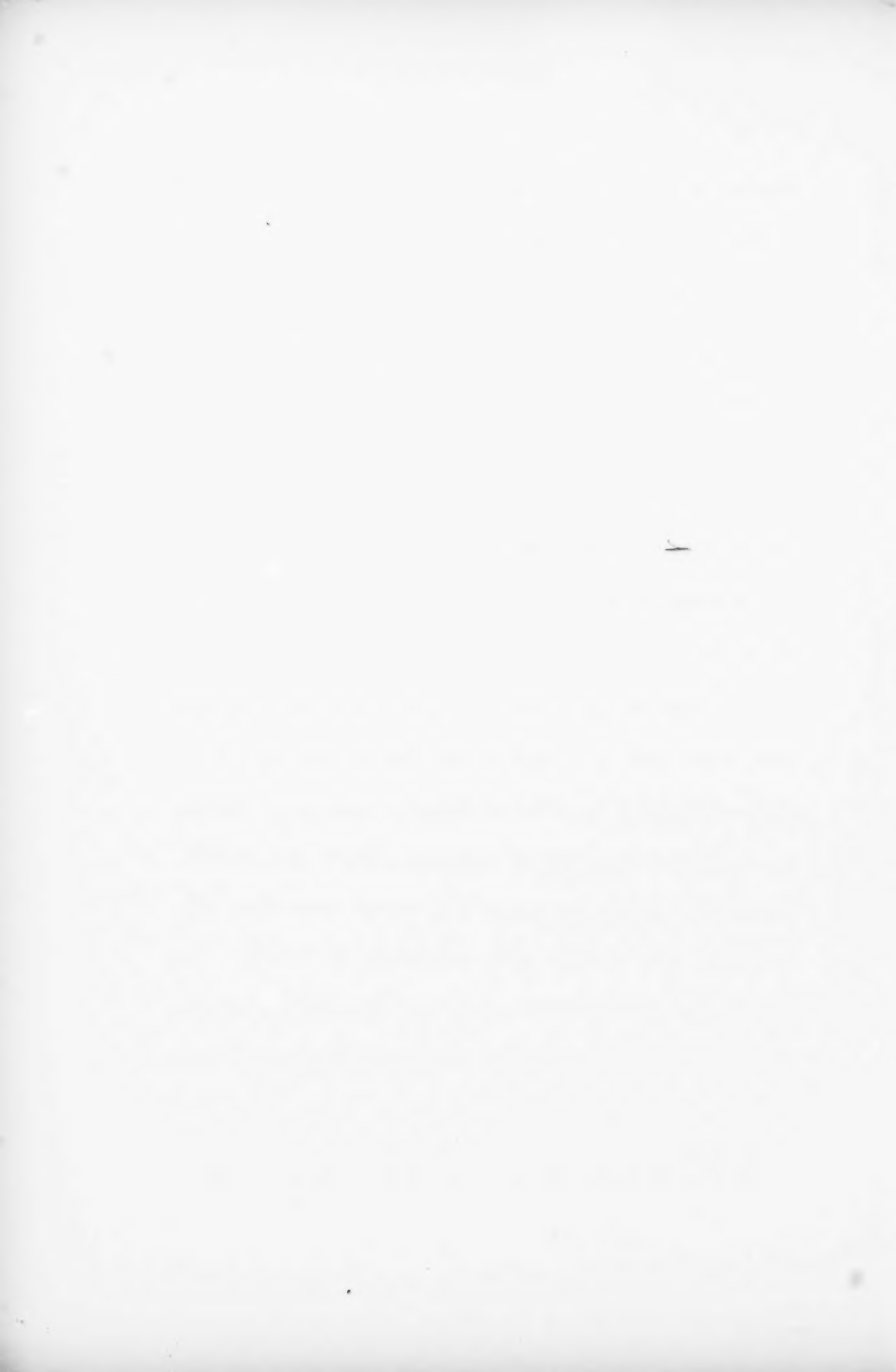
7. For Connecticut, *see* Curry, First Freedoms, *supra*, at 3, 79-83.

Winthrop's words, "manifestly dangerous to the state." L. Levy, Blasphemy, *supra*, at 247.

Seventeenth century Quakers who openly challenged the official version of truth met a far harsher fate -- several of them were executed. A prominent Boston minister, in response to protests, defended these persecutions on the ground that Massachusetts was "originally a plantation religious, not a plantation of trade." Curry, First Freedoms, *id.* at 22.

It was not until 1691 that non-Congregationalists had any political rights in Massachusetts, P.V. Bonomi, Under the Cope of Heaven: Religion, Society and Politics In Colonial America (1986) (hereafter, "Bonomi, Under the Cope") at 61-62, and then only because the Crown felt obligated to protect the political rights of those citizens of Massachusetts who adhered to the established church of England.⁸ The

8. Somewhat earlier, recognizing the need to enfranchise some of those who under the rigorous prevailing Congregationalist
(continued...)



new right to political participation did not extend to Catholics. C. Bridenbaugh, Mitre and Sceptre (1963) at 174.

Many of the other colonies had varying degrees of identification of churches with political power. "[I]n the minds of royal governors, religious and political centralization blended into a picture of social order that must be imposed on the colonies." Curry, First Freedoms at 58. The overlap of religion with politics was substantial. Pennsylvania in 1705 excluded Catholics, Jews and non-believers from the franchise, an exclusion that continued there and in other states until the Revolution and sometimes beyond. Bonomi, Under the Cope at 36.⁹ In colonial

8.(...continued)

(Calvinist) doctrines were not Church members, the leaders of Massachusetts adopted the half-way covenant that allowed greater numbers of citizens to be admitted to some sort of membership in the Church and hence to the franchise. See S.E. Ahlstrom, A Religious History of the American People, 158-60 (1972).

9. In Virginia, the Anglican Commissary sought to create ecclesiastical courts to try offenses against public morality, Bonomi, Under the Cope at 43, a proposal that met with great
(continued...)

South Carolina, church "parishes were becoming key units of local government." Bonomi, Under the Cope at 49.

Opponents of established churches were quick to point out that one of the costs of organizing politics along religious lines was the exclusion of potential immigrants who would not go to those colonies in which they were not welcome to participate in communal affairs. Nevertheless, Virginia's established church pushed non-conformists out of the state into neighboring Maryland. Curry, First Freedoms at 30, 42. Colonies like Georgia, which had only the mildest of establishments eschewed more rigorous forms precisely in order to encourage immigration. Curry, First Freedoms at 38 (Maryland); Bonomi, Under the Cope at 31-33 (same

9.(...continued)

resistance, as did other efforts to bring an Anglican bishop to the United States, because it was perceived as an attempt to recreate the hated partnership of church and state. Larkin v. Grendel's Den, supra, 459 U.S. at 127, n.10; see C. Bridenbaugh's suggestively titled book, Mitre and Sceptre (1963).



as to Carolina)¹⁰. See also 5 The Founders Constitution at 58 (remarks of Patrick Henry).

B. The Drafting of the Constitution Shows An Intent to Exclude Religious/Political Unions

The history of the efforts to draft a constitutional doctrine that would prevent a recurrence of the evils of establishment has been recounted on many occasions in the opinions of this Court, and need not be detailed here at length.¹¹ That history demonstrates clear determination to avoid the errors of the more distant past as well as more recent forms of established religion.

The Virginia debate on the subject of religious liberty was closely followed and widely influential -- and, as the Court has recognized, particularly important to understanding the First Amendment

10. North Carolina's 1669 Constitution did limit the privilege of free-holders to those who acknowledged God. 5 The Founders Constitution at 51.

11. See, e.g., Everson v. Bd. of Ed., 330 U.S. 1 (1947); id. at 28 (Rutledge, J., dissenting); Engel v. Vitale, 370 U.S. 421 (1962); Lee v. Weisman, 112 S.Ct. 2649, 2669-76 (1992) (Souter, J., concurring).

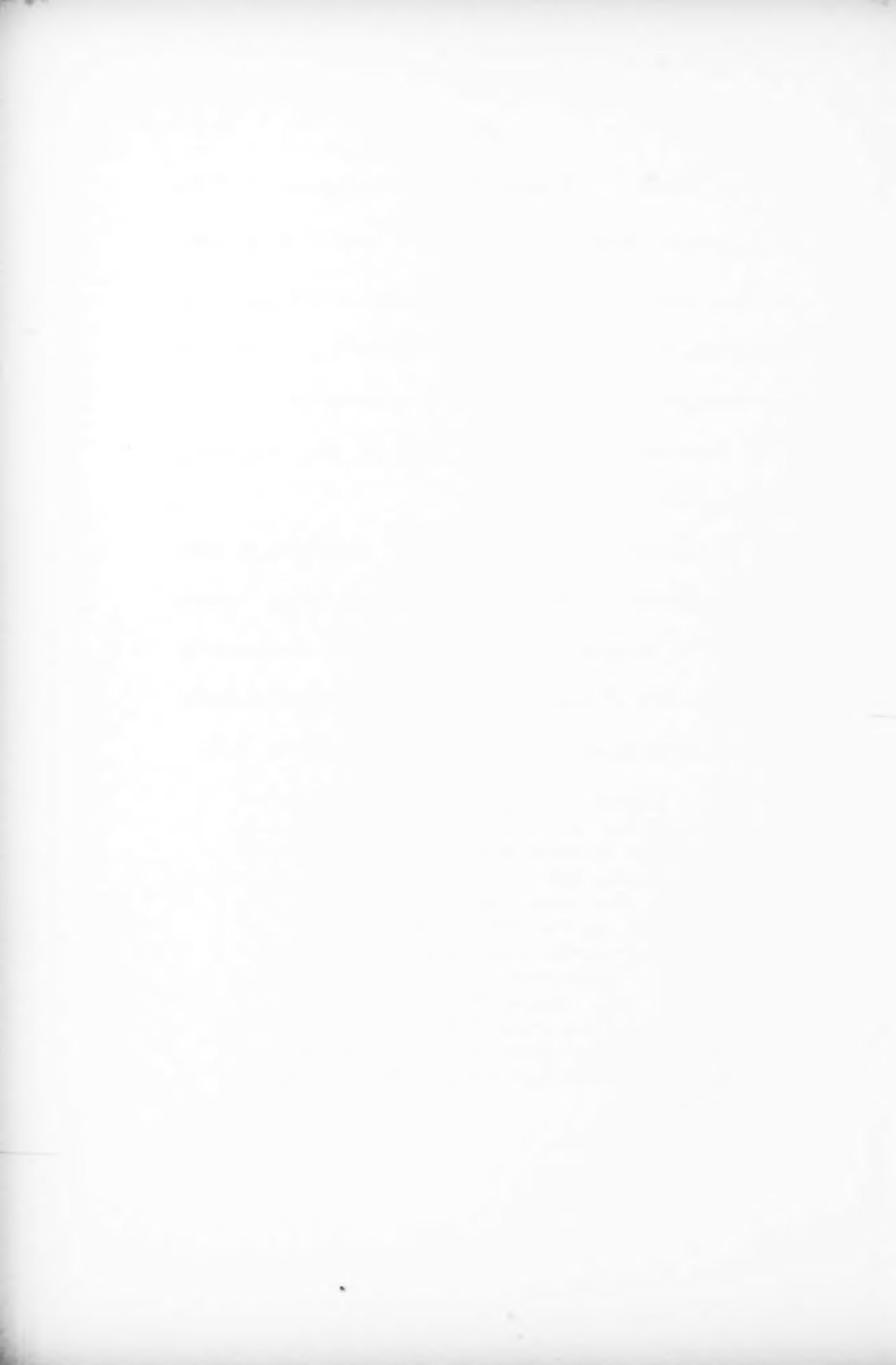


itself, *PEARL v. Nyquist*, 413 U.S., *supra*, at 770, n.28 (1973); *Engel v. Vitale*, *supra*, 370 U.S. at 428.

In the end, Virginia swept away all vestiges of establishment, including, notably, political advantages for adherents of the established church. T.E. Buckley, Church and State In Revolutionary Virginia (1977) at 113-72.

Defenders of the status quo understood that their opponents were not just attacking actual political or religious oppression, but the assumption that the unity of church and state was indispensable for the social good. The status quo assumed that:

. . . [religion] needed public expression not only for its own maintenance but also to build the common basis of confidence and trust among men. Believing in and worshipping the same God would make men cognizant of the fact that they were all operating under the same general principles. Consequently, the government should be concerned to provide a "competent provision" for those who had devoted their lives to the promotion of religious belief and the inculcation of moral values.



T.E. Buckley, *supra*, Church and State In Revolutionary Virginia at 142; *see id.* at 95.

Some of those who opposed ratification of the Constitution decried the absence of a strong guarantee of full equality for members of all faiths. This was so despite the fact that the right to political equality at the level of federal office-holding was written into the body of the Constitution in the No Religious Test Clause of Article VI. That Clause itself marked a sharp break between the older system of organizing politics on religious lines and the newer secular politics. It was opposed and defended in full recognition of the scope of that change. See 4 The Founders Constitution at 633-46.

Justice Story summed up the change wrought by Article VI in his influential treatise on constitutional law:

This [no tests] clause is not introduced merely for the purpose of satisfying the scruples of many respectable persons, who feel an invincible repugnance to any religious test, or affirmation. It had a higher objective; to cut off for ever every



pretence of any alliance between church and state in the national government. The framers of the constitution were fully sensible of the dangers from this source, marked out in the history of other ages and countries; and not wholly unknown to our own.

Commentaries on the Constitution (reprint ed. 1987, R.D. Rotunda and J.E., Nowak, editors) at p. 690-91.

The First Amendment carried this principle of "cutting off any alliance between church and state" still further, *Torcaso v. Watkins*, 367 U.S. 488, 491-92 (1961), so as to preclude any effort either to limit the franchise on religious lines or to align religion with political power. Alerted by a suspicious citizenry¹² to the dangers to liberty of even a partial concord between religious preachment and the exercise of political power, the Framers were not prepared to tolerate even partial combinations of political power

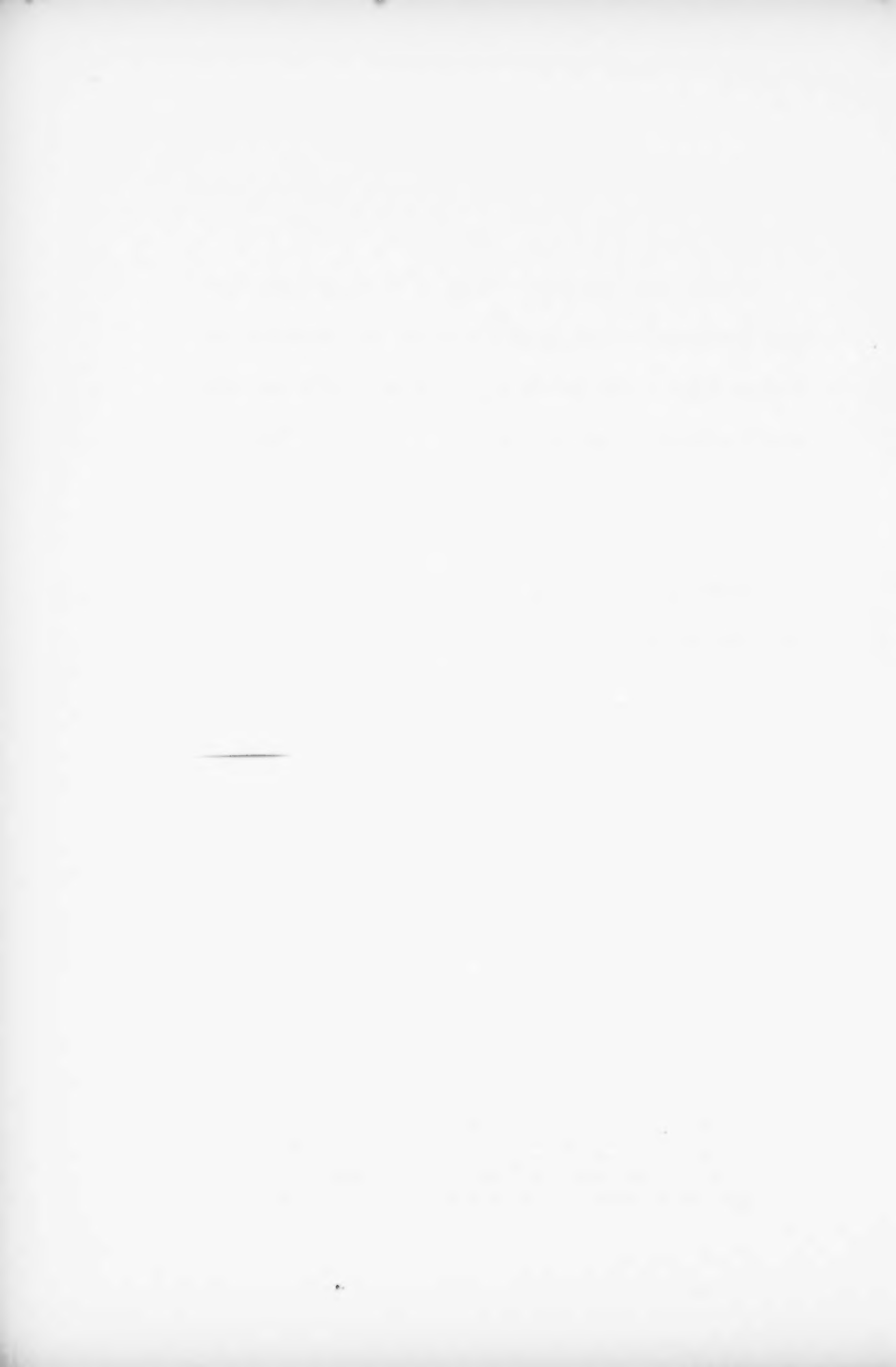
12. See, e.g., 5 The Founders Constitution at 12 (protest of New York ratifying convention); 18 (North Carolina).



and religion.¹³ The result was the Establishment Clause.

Given this history, then, it is clear that those who demanded, drafted and ratified the Establishment Clause were fully aware of the danger of organizing politics along religious lines and intended to foreclose that possibility at the federal level. The Framers, indeed, prohibited all practices tending toward -- "respecting" in the language of the Constitution -- an established church. "A law may be one 'respecting' the forbidden objective while falling short of its total realization." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), cited in *PEARL v. Nyquist*, *supra*, 413 U.S. at 770. A fortiori, it follows that the Founders would not have tolerated a deliberate effort to facilitate political power solely along religious lines, which is in itself an establishment.

13. See, T.J. Curry, The First Freedoms: Church and State In America to the Passage of the First Amendment (1986) 210-14; D. Laycock, Nonpreferential Aid to Religion: A False Claim About Intent, 27 Wm. & Mary L.Rev. 875 (1986).



C. Subsequent History

Because the issue was so decisively settled with the adoption of the First Amendment, there are not many subsequent events which test the principle. But what there is is fully consistent with the holding in *Larkin*. In the 1830s, Congress was urged to close the Post Office on Sundays on the ground that its opening on those days was inconsistent with Christianity. A House committee rejected these calls "to unite church and state" or to "unite politics and religion" and announced an understanding of the First Amendment pertinent here. "All religious despotism commences by combination and influence"; and "the catastrophe of other nations furnishes an awful warning of the consequences" H. Rep. 87, 21 Cong., 1st Sess., reproduced in W. Lowrie and W. Franklin, American State Papers: Class VII (1834), 229-231. See 2 A.P. Stokes, Church and State In the United States (1950) at 12-20.

The fight over the admission of Utah as a state is also instructive. Here Congress sought to impose

the non-establishment principles of the First Amendment in the face of what was for a time a full-fledged theocracy. Apart from the issue of polygamy, many Americans opposed the creation of a state organized along religious lines and controlled entirely by the Mormon church, a position that contributed to a denial of statehood for some time. 2 A.P. Stokes, *supra*, Church and State In the United States at 46-47. Ultimately, Congress relented, but to appease Congress, Utah's constitution provided (and still provides) that "there shall be no union of Church and State nor shall any church dominate the State or interfere with its functions," Utah Constitution, Article I, § 3 (emphasis added).¹⁴ The "no union of church and state" proviso was directly tailored to guard against what Justice Powell termed the exercise of significant religious control over democratic processes. That opposition to Utah

14. For a history of this provision, see Society of Separationists v. Whitehead, 1993 W.L. 521202 (Utah 1993) at *7, 14, 17.



statehood reflects an understanding of the First Amendment inconsistent with the actions of the New York legislature in this case.

What few cases there are considering actual unions of church and state also point in the direction of the unconstitutionality of KJSD.¹⁵ *State v. Celmer*, 80 N.J. 405, 404 A.2d 1 (1979) and *Oregon v. Rajneeshpuram*, 598 F.Supp. 1208 (D. Oregon 1984) are particularly instructive. In both these cases, a group of people drawn together for religious purposes sought or had attained municipal incorporation. In each, the incorporation was challenged as an establishment. In neither was the

15. In *People v. Rose*, 92 Misc.2d 429, 368 N.Y.S.2d 387 (Sup.Ct. Rockland County, 1975) the court invalidated a judicial proceeding which was held in a girls' religious school in the town of New Square. Like Kiryas Joel, New Square is a town composed exclusively of Hasidim. Among the grounds for invalidating the proceeding was the fact that the hearing took place in a Jewish parochial school in violation of the principle that religion may not be closely associated with the exercise of political power. 82 Misc.2d at 431, 368 N.Y.S.2d at 391.

use of municipal power to further theological positions at issue.

In *Celmer*, the New Jersey Supreme Court held that the incorporation was invalid under the Establishment Clause. The governing body of the city was the governing body of the religious corporation, the Ocean Grove Camp Meeting, a Methodist establishment. And even though that was not the case in *Rajneeshpuram*, the District Court nevertheless refused to dismiss a claim that Oregon could not constitutionally recognize the incorporation of a township intentionally organized along religious lines.

The only distinction between this case and these precedents is a bare formality of legal form. KJSD is not formally a religious body. But as this Court held in *Lee v. Weisman*, *supra*, 112 S.Ct. at 2659, the "[l]aw reaches past formalism" to protect religious liberty.

III
THE BACKGROUND FACTS LEAVE NO
DOUBT AS TO THE RELIGIOUS
NATURE OF THE SCHOOL DISTRICT

It remains to demonstrate that the bar against overlapping political and religious power is applicable here. There is no room for dispute on this score. KJSD embodies only the Village of Kiryas Joel, an all-Hasidic community [Joint Appendix at 8-17], which seceded from the larger town of Monroe. *Id.* at 10-12. Kiryas Joel's boundaries were carefully drawn to exclude all non-Hasidim, a sort of reverse Tuskegee, *Gomillion v. Lightfoot, supra*. An earlier proposal to create the Village was withdrawn because the boundaries encompassed non-Hasidim. *Id.* at 13. It is this Hasidic-only village -- and only this village -- that comprises KJSD.

Governor Cuomo's message approving the legislation creating KJSD expressly noted that "the Village of Kiryas Joel['s] . . . population are all members of the same religious sect." *Id.* at 40-41. The legislative sponsor acknowledged that the

District was created to serve "the Hasidic Jewish community [which] holds firmly to its religious tenets." *Id.* at 19-20. Similarly, Petitioner Monroe-Woodbury School District, writing to the Governor to announce it supported the legislation, noted that no non-Hasidic family lived within the Village of Kiryas Joel.¹⁶ *Id.* at 21-22]. From all of this, it is plain that the rationale for the KJSD was solely religious. No geographic, economic, class, historic factor other than religion can explain the configuration of KJSD.

The presence of an intent to create a religious-political enclave readily serves to distinguish this case from the common happenstance in which some religious group predominates in a community. This distinction is entirely in keeping with general principles of constitutional law, which provide that a malignant purpose or an intent to further an illicit

16. Petitioner Monroe-Woodbury School District stated that if any non-disabled child within KJSD wanted to attend public school he or she would attend Monroe-Woodbury school, with KJSD paying tuition. KJSD has no facilities for the non-disabled student. *Id.*



purpose can invalidate an otherwise permissible act because, as Justice O'Connor has explained, it suggests an improper balancing of costs and benefits, with illicit benefits weighed in the scales. *Wallace v. Jaffree*, *supra*, 472 U.S. at 75 (O'Connor J., concurring).

A school district that happens to be all-white or all-black as a result of no identifiable discriminatory act is constitutional, *Miliken v. Bradley*, 418 U.S. 717 (1974); a district created to segregate is the unconstitutional evil *Brown v. Bd. of Education*, 344 U.S. 1 (1954) struck down. See *U.S. v. Scotland Neck*, 407 U.S. 484 (1972), *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972). Similarly, some neutral regulations of charities are permissible; regulations aimed at suppressing a particular religious charity are not, *Larsen v. Valente*, 456 U.S. 228 (1982); a sales tax on newspapers is constitutional; one aimed at suppressing political

criticism is not, *Minneapolis Star Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

The immediate impetus that triggered the establishment of KJSD was the refusal of Petitioner Monroe-Woodbury in the wake of *Aguilar v. Felton*, 473 U.S. 402 (1985)¹⁷ to provide special educational services to Hasidic children at sites other than its own public schools. The violation identified in *Aguilar* was that, under public control, public officials taught in a parochial school. KJSD is a far greater violation of the Constitution.

In its incarceration as KJSD, the Hasidic community receives more than government assistance. It exercises the power to tax any property within its jurisdiction; it has the power to regulate any child attending its school; it has the power to spend for any purpose related to the school or its function; it has the power to design curriculum and programs and

17. See *Monroe-Woodbury School District v. Weider*, 72 N.Y.2d 174, 531 N.Y.S.2d 889 (1988).



impose them on all families within its jurisdiction; and it has all the other political and governmental powers of a public school district. It is a lesser violation of the Establishment Clause to provide for special education for the disabled in a private religious school; it is far worse to turn a religious community into a governmental entity and give it both public money and governmental power.

The configuration of KJSD was solely religious, just as colonial Massachusetts and Connecticut were set up with religion as the organizing principle of the political unit. In creating KJSD, New York impermissibly "foster[ed] the creation of political constituencies along religion lines." *Lynch v. Donnelly*, *supra*, 465 U.S. at 688 (O'Connor, J., concurring). KJSD in fact is an unconstitutional "state or local embrace of a particular religious sect." *Lamb's Chapel v. Center Moriches School District*, *supra*, 113 S.Ct. 2141, 2151 (1993) (Scalia and Thomas, JJ., concurring).

IV
THE LEMON TEST SHOULD NOT
BE RECONSIDERED

The court below did not adopt the specific theory we advocate in Points I-II of this brief. Instead, a majority found that the legislation creating KJSD had the impermissible effect of advancing religion in violation of the second prong of the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). For the reasons assigned by the Respondents, the conclusion that the legislation creating KJSD is inconsistent with *Lemon* is unassailable. It need not be defended here either under the traditional *Lemon* analysis or the alternative understanding suggested by Justice O'Connor in *Lynch v. Donnelly supra*, 465 U.S. at 688-90, and assimilated into the *Lemon* test in *County of Allegheny v. A.C.L.U.*, *supra*, 492 U.S. at 593.¹⁸ The

18. We do note that it is difficult to translate a test designed to identify cases in which government improperly identifies itself by word or symbol with religion – the primary thrust of
(continued...)



Court of Appeals was bound by *Lemon*. Despite criticism, *Lemon* has "not been overruled", *Lamb's Chapel v. Center Moriches School District*, 113 S.Ct. 2141, 2148, n.7 (1993), and is constantly applied in this Court and lower state and federal courts.

Petitioners (other than New York State) in this Court argue not only that KJSD's creation did not run afoul of any of *Lemon*'s three prongs, but that the doctrine ought to be dispensed with entirely, at least to the extent that it is applied to laws "designed to remove barriers that prevent religious minorities from practicing their religion." [KJSD Brief at 44-45; Monroe-Woodbury Brief at 45-49]. They suggest that the true purpose of the religion clauses is religious

18.(...continued)

Justice O'Connor's test in Lynch and County of Allegheny - to this case, where the State of New York has in fact set up a public school district along religious lines. While amici believe that verbal or symbolic endorsements of religion can be unconstitutional, such violations pale in comparison to the magnitude of the violation here. Just as a jeweler's scale cannot be used to weigh a truckload of gravel without being crushed, so too a test designed to check endorsements is overwhelmed by a full-fledged established religion.



liberty and that accommodation, not separation, is the essence of religious liberty. *Amici* on the other hand believe that, while accommodation is an essential element of religious liberty, separation is no less integral to constitutional principle of religious liberty.

Petitioners would have the Establishment Clause limited to the "evils" at which the Clause was directed -- "sponsorship, financial support, and active involvement . . . in religious activity" [KJSD brief at 44, citing *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).] We have already demonstrated in Points I and II that this case, involving a joint enterprise between church and state and a sharing of political authority between them, presents the very evils *Walz* identifies as targets of the Establishment Clause. Because it is unnecessary to apply the *Lemon* test in this case, there is no need to reconsider that case here, for in any event,



Petitioners have not made out the requisite showing to overcome a settled rule of constitutional law.

Stare decisis applies to constitutional decisions as well as to statutory ones, *Planned Parenthood v. Casey*, 112 S.Ct. 2791 2808-09 (1992), for "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Patterson v. McClean Credit Union*, 491 U.S. 164, 172 (1989), citing *Welsh v. Texas Department of Highways*, 483 U.S. 468, 494 (1987). Even in constitutional cases, *stare decisis* "carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification'" *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), cited in *Payne v. Tennessee*, 111 S.Ct. 2597 (1991) (Souter, J., concurring).

In *Planned Parenthood*, the Court pointed to several "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law." 112 S.Ct.



at 2808. The weight accorded *stare decisis* at a minimum means that no case should be overruled unless the outcome of the subsequent case would be different. Overruling *Lemon* does not change the result here. On any historically or precedently grounded test, KJSD is unconstitutional.

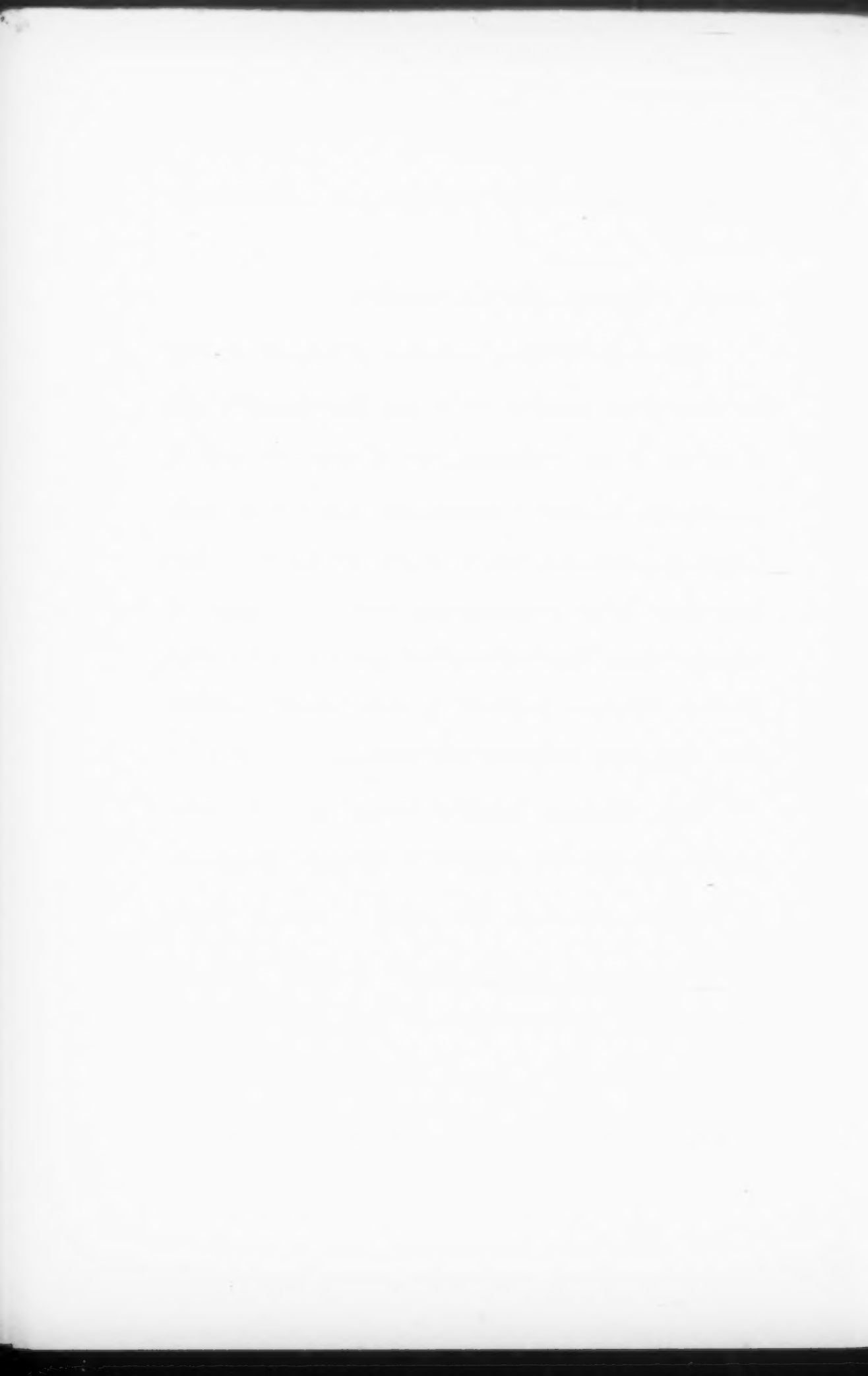
The criteria to which the Court pointed in *Planned Parenthood* are: 1) whether the rule is unworkable in practical terms; 2) whether there is some special kind of societal reliance on the prior rule; 3) whether related principles of law developed so as to leave the old rule a remnant of a repudiated approach; and 4) whether social circumstances have changed so as to leave the old rule without application or justification. And although unstated in *Planned Parenthood*, implicit in its discussion was the question of whether the prior case was wrongly decided. Applied to *Lemon* each of these criteria (which we take up in slightly different order) negates the existence of "special circumstances" which are a

necessary predicate to overruling a constitutional decision.

A. Lemon Is Not Unworkable

One of the common criticisms of *Lemon*, echoed by some of the Petitioners, is that the tripartite test of *Lemon* is not workable, that it does not lead to predictable results. Petitioners assert that their proposed test will solve these problems. But Petitioner KJSD's suggestion that the rubric of "sponsorship, financial support and active involvement in religious activity" is more readily applied than the *Lemon* test does not withstand scrutiny.

Does funding religious based sex education constitute "financial support" of religion? See *Bowen v. Kendrick*, 487 U.S. 589 (1988). What of aid to parochial schools in its various forms? Compare *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985) with *PEARL v. Regan*, 444 U.S. 646 (1980). Is display of a municipal creche "active involvement in



religious activity"? Compare *County of Allegheny v. A.C.L.U.*, *supra*, with *Lynch v. Donnelly*, *supra*. Does inviting a minister to offer a prayer at high school graduation constitute "sponsorship . . . or active involvement in religious activity"? *Lee v. Weisman*, *supra*. What about permitting students to offer such a prayer upon vote of their peers? Compare, *Jones v. Clear Creek ISD*, 977 F.2d 963 (5th Cir. 1992) with *Gearon v. Loudoun County School Bd.*, 93-730-A (E.D. Va. 1993).

Nor is certainty of adjudication materially advanced by adopting a "coercion" standard,¹⁹ as Justice Kennedy, joined, *inter alia*, by Justice Scalia, suggested in *County of Allegheny v. A.C.L.U.*, *supra*. Justices Kennedy and Scalia themselves disagreed over the application of that standard in *Lee v.*

19. The difficulty the courts had in administering the coercion test prior to *Miranda v. Arizona*, 384 U.S. 436 (1966) is instructive.

Weisman, 112 S.Ct. 2649 (1992), both finding it an easy case, one confident that coercion existed, 112 S.Ct. at 2658-59, the other insisting the claim was "incoherent." 112 S.Ct. at 2681.

The problem is not that the existing *Lemon* standard is unworkable, as Petitioners charge. Lower courts have managed to apply *Lemon* for a quarter of a century. Rather, it is the difficulty of applying the Establishment Clause to a kaleidoscope of fact patterns, each with its own unique twists, that creates difficult cases. Cases reaching this Court in particular are likely to be hard, and will often call for careful line-drawing. Any test that both takes the Constitution seriously and respects democratic self-governance will require careful line-drawing. *Lemon* does both.

Petitioners' quarrel is not with the Court's formulation of a test; it is that the Court's decisions take the Establishment Clause seriously. That Clause, at a minimum, bars joint exercises of power

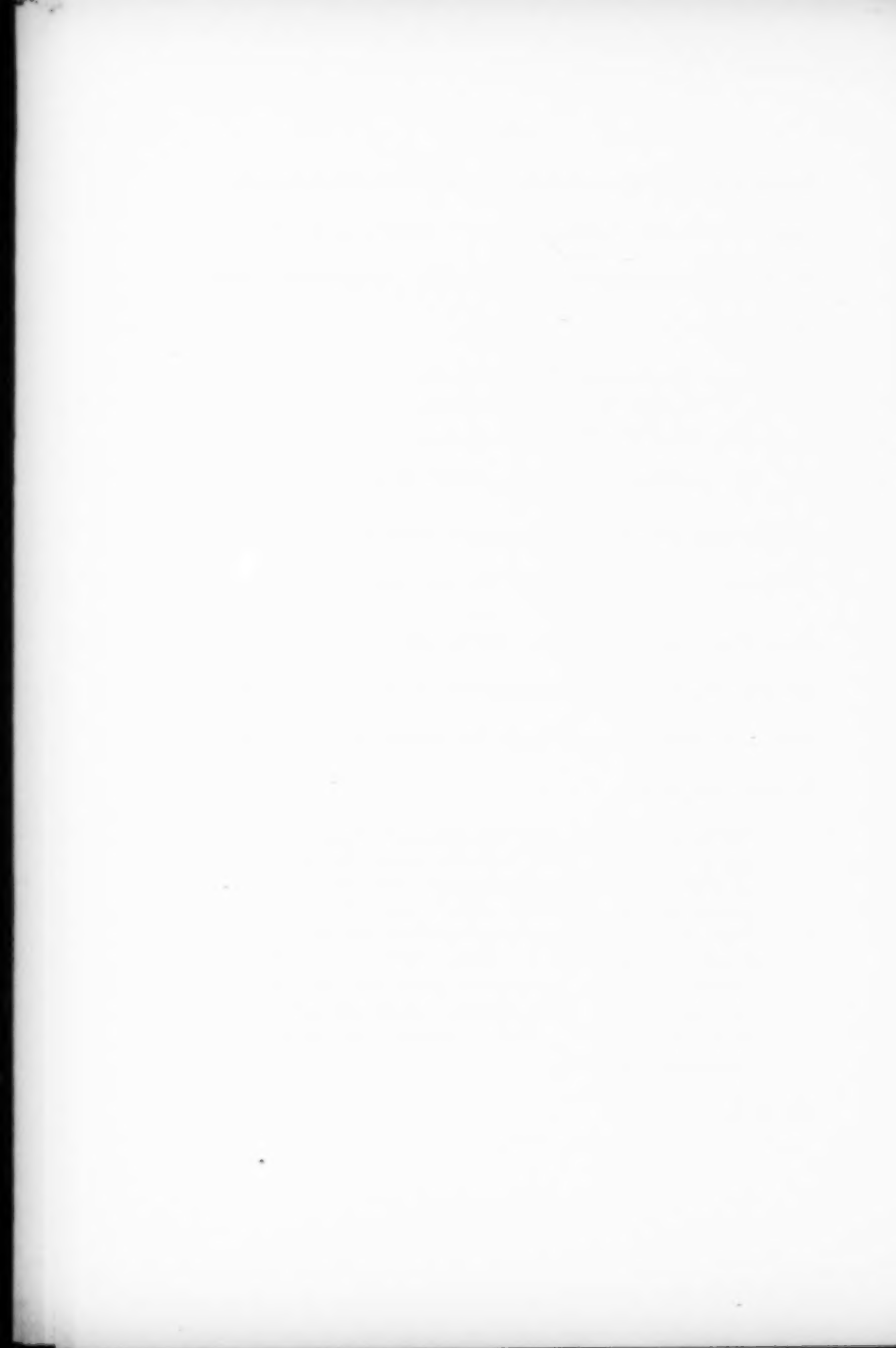
by religion and government, and it will, of necessity, limit religion and religious institutions in at least some ways not applicable to secular ideologies and institutions.

B. The *Lemon* Rule Is Fully
Woven Into The Texture
Of The Law

In calling for the overruling of *Lemon*, Petitioners are challenging more than just its three-part test. The *Lemon* test did not spring full blown from the brow of Zeus. In announcing it, Chief Justice Burger did not purport to announce a new rule. Instead, he anchored the tripartite test firmly in past decisions:

Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz, supra*, at 674. (emphasis added)

403 U.S. at 612-13.



Ironically, Chief Justice Burger, citing *Walz*, said that this tripartite test was intended to flesh out the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement in religious activity,'" 403 U.S. at 612, the very test that KJSD says should take the place of the three-part test. The grounding of *Lemon* in the part of *Walz* to which Petitioners point was again emphasized in *PEARL v. Nyquist*, *supra*, 413 U.S. at 770-73. The purpose and effect branches of *Lemon* were lifted *in hac verba* from *School District of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963). The entanglement branch came directly from *Walz*, the very case that Petitioners say reflects a truer understanding of the Establishment Clause than *Lemon*.²⁰

20. Tellingly, Petitioners and their amici offer no single alternative to Lemon. KJSD suggests language from Walz, but
(continued...)



In sum, Petitioners take aim not just at *Lemon*, but at all those cases whose holdings it subsumes. Just as certainly, because *Lemon* is so firmly rooted in all of this Court's modern Establishment Clause jurisprudence, and because it has well served the interests of religious freedom and peace that *stare decisis* powerfully calls for its reaffirmation, not its demise.

C. *Lemon* Was Correctly Decided

The Court has repeatedly canvassed the history of the First Amendment, and concluded that it embodies a principle of neutrality, not just non-preferentialism, which has been the major alternative offered by critics of *Lemon*. Although the Court's

20.(...continued)

as demonstrated, that language gave birth to the *Lemon* test. Monroe-Woodbury proffers either a non-preferential approach inconsistent with the Clause's history, or a general acceptance of anything labelled accommodation. Amici supporting Petitioners propose various alternatives, from abandoning the effect test, to modifying it, to adoption of a pure coercion test. The lack of a self-evidently better rule upon which all of *Lemon*'s critics can agree is further reason not to overturn *Lemon*.



accepted reading of the Establishment Clause as embodying a policy of separation has been challenged, R. Cord, Separation of Church and State (1982), more recent historical research by scholars such as Leonard Levy,²¹ Thomas Curry²² and Douglas Laycock,²³ proves that the non-preferentialist approach is historically untenable, as even scholars critical of "separationism" acknowledge. M. McConnell, Religion at the Crossroads, 59 U. Chi. L. Rev. 115, 146, n.142 (1990).

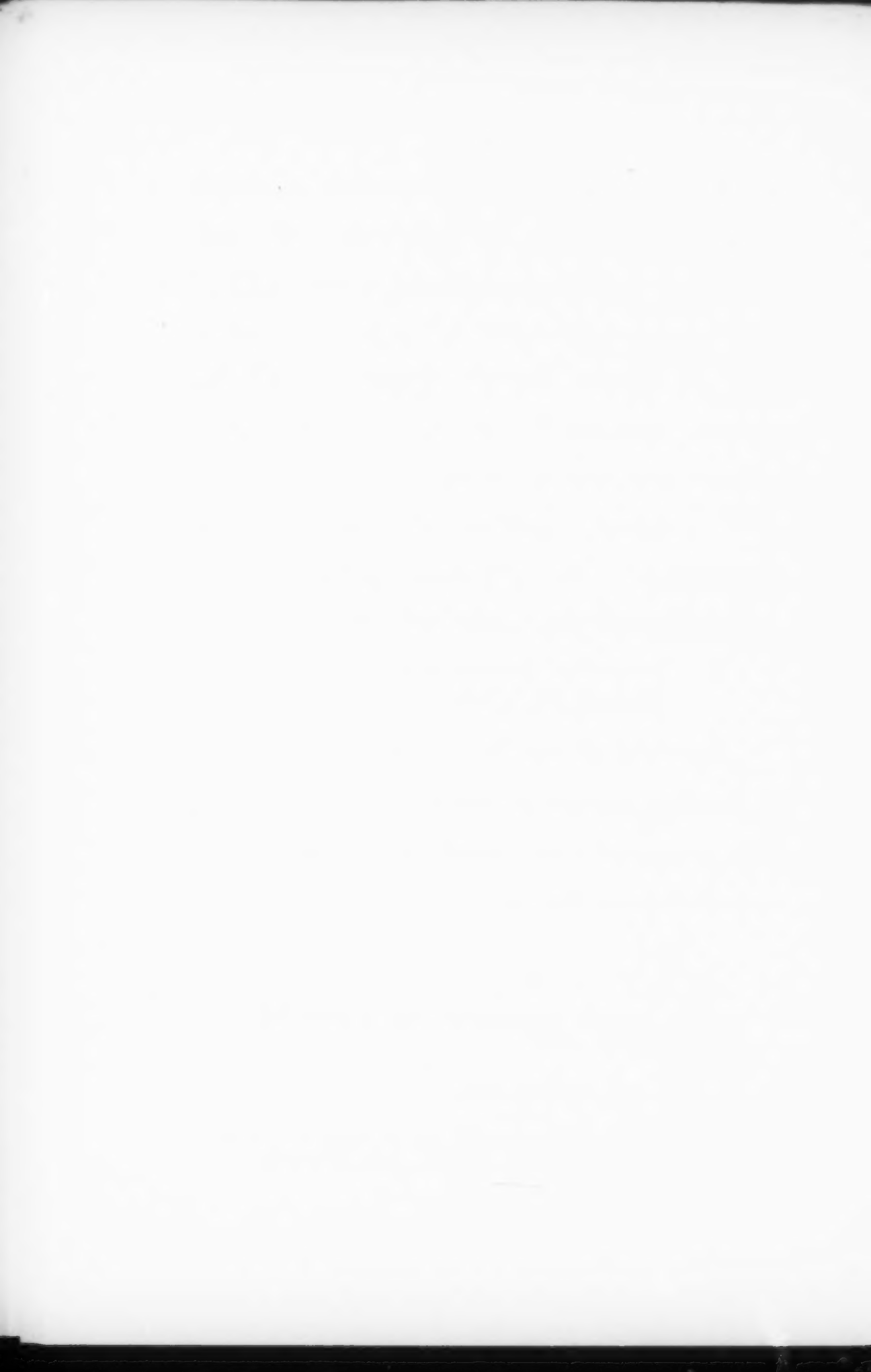
D. There Has Been Substantial
Reliance on Lemon

Moreover, given *Lemon*'s origin as a restatement of prior law, its demise, particularly on the unusual facts presented here, would cast doubt on every prior decision of this Court, and of the lower courts,

21. L.W. Levy, The Establishment Clause: Religion and The First Amendment (1986).

22. Curry, First Freedoms, *supra*.

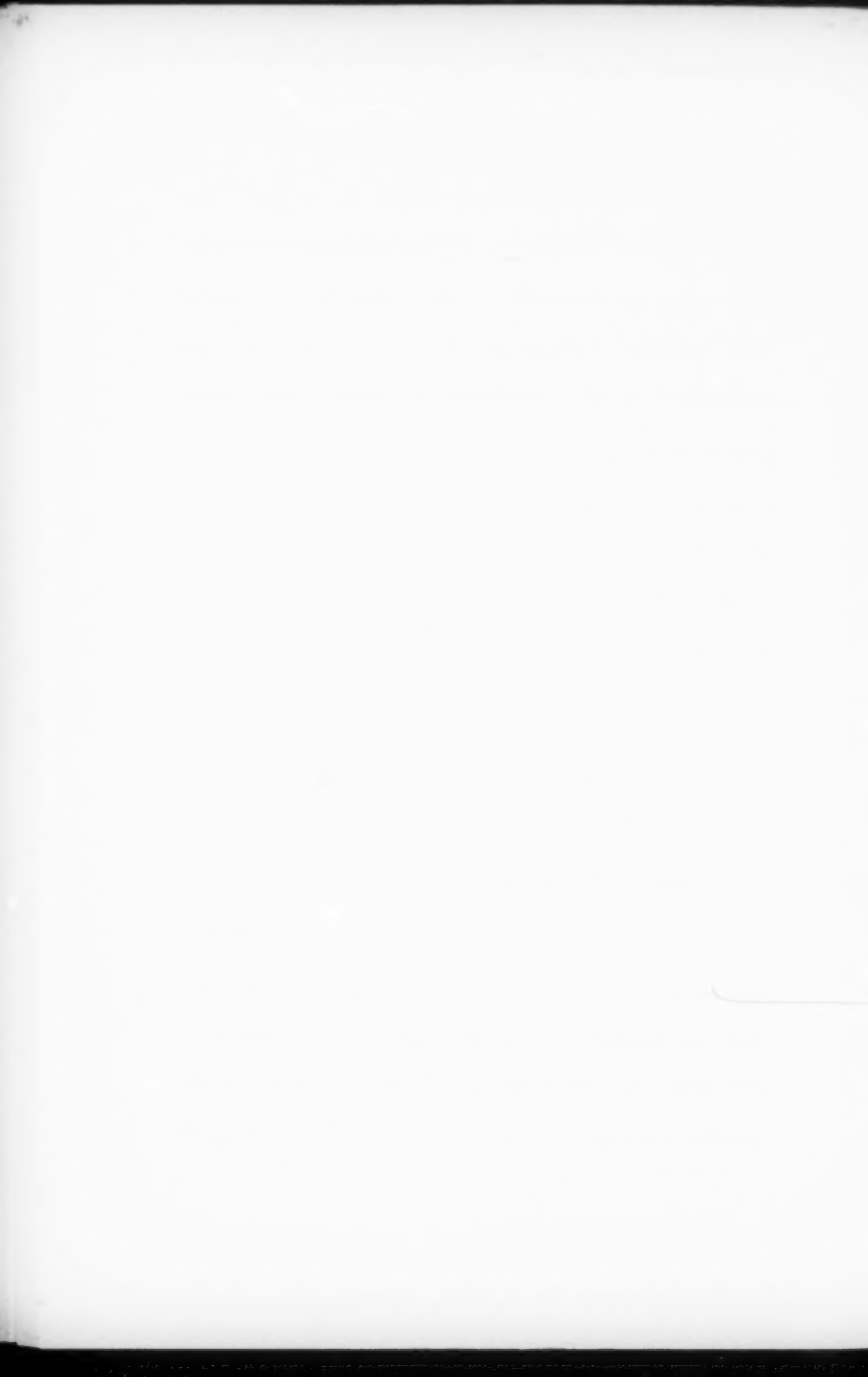
23. D. Laycock, Non-Preferential Aid to Religion: A False Claim About Intent, 27 Wm. & Mary L.Rev. 875 (1986).



all of which now, and for almost 25 years, have regularly applied *Lemon*. Overruling *Lemon* would not elucidate questions encountered by the courts with greater frequency than the unusual one presented here. Abandoning *Lemon* here would gratuitously impose upon legislatures, state attorneys generals and school boards the burden of re-litigating issues long settled, certainly legally, and, in large part, socially as well, and all to no point, because the judgment below would in any event be reaffirmed.

V
KIRYAS JOEL SCHOOL DISTRICT
IS NOT A PERMISSIBLE FORM
OF ACCOMMODATION

Some of Petitioners and their *amici* also urge that *Lemon* should be overruled because it interferes with the accommodation of minority religions and hence does not respond to the changes in social reality of late 20th century America. [KJSD Brief at 40-43; Monroe-Woodbury Brief at 45-49.] They complain



that under *Lemon*, the Establishment Clause wholly swallows up the Free Exercise Clause, and with it any notion of accommodation. We agree that a reading of the Establishment Clause that prohibited any accommodation would be wrong. But *Lemon* does not countenance, much less mandate, such a departure from neutrality. The same court which decided *Lemon* decided *Wisconsin v. Yoder*, 406 U.S. 205 (1972), perhaps this Court's most far reaching application of the doctrine of accommodation.

Petitioners also fail to explain why their proposals would not allow the accommodation doctrine to swallow up the Establishment Clause, especially in those cases where a particular accommodation is discretionary, not mandatory, as concededly is the case here. [KJSD Brief at 42.]

Apart from the untenable nature of the argument, which flies in the face of numerous "accommodation" decisions, Petitioners' accommodation argument is also not new; practically every

practice that has been condemned by this Court as an establishment has been defended as an accommodation. See, e.g., Engel v. Vitale, 370 U.S. 421 (1962); Wallace v. Jaffree, 472 U.S. 38 (1985); Lee v. Weisman, *supra*. And while there may be somewhat greater religious diversity now than when *Lemon* was decided, the problem of accommodation was far from unknown then, even for radically separatist sects. Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). The difficulty of reconciling accommodation and separation was also not unknown before the *Lemon* test was formulated, Sherbert v. Verner, *supra*, 374 U.S. at 422 (Harlan, J., dissenting).²⁴

Defining the boundaries of permissible accommodation has proven quite difficult for this

24. If there is a contemporary threat to accommodation – and there is – it comes from this Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990), a Free Exercise Clause decision, not from its Establishment Clause decisions.



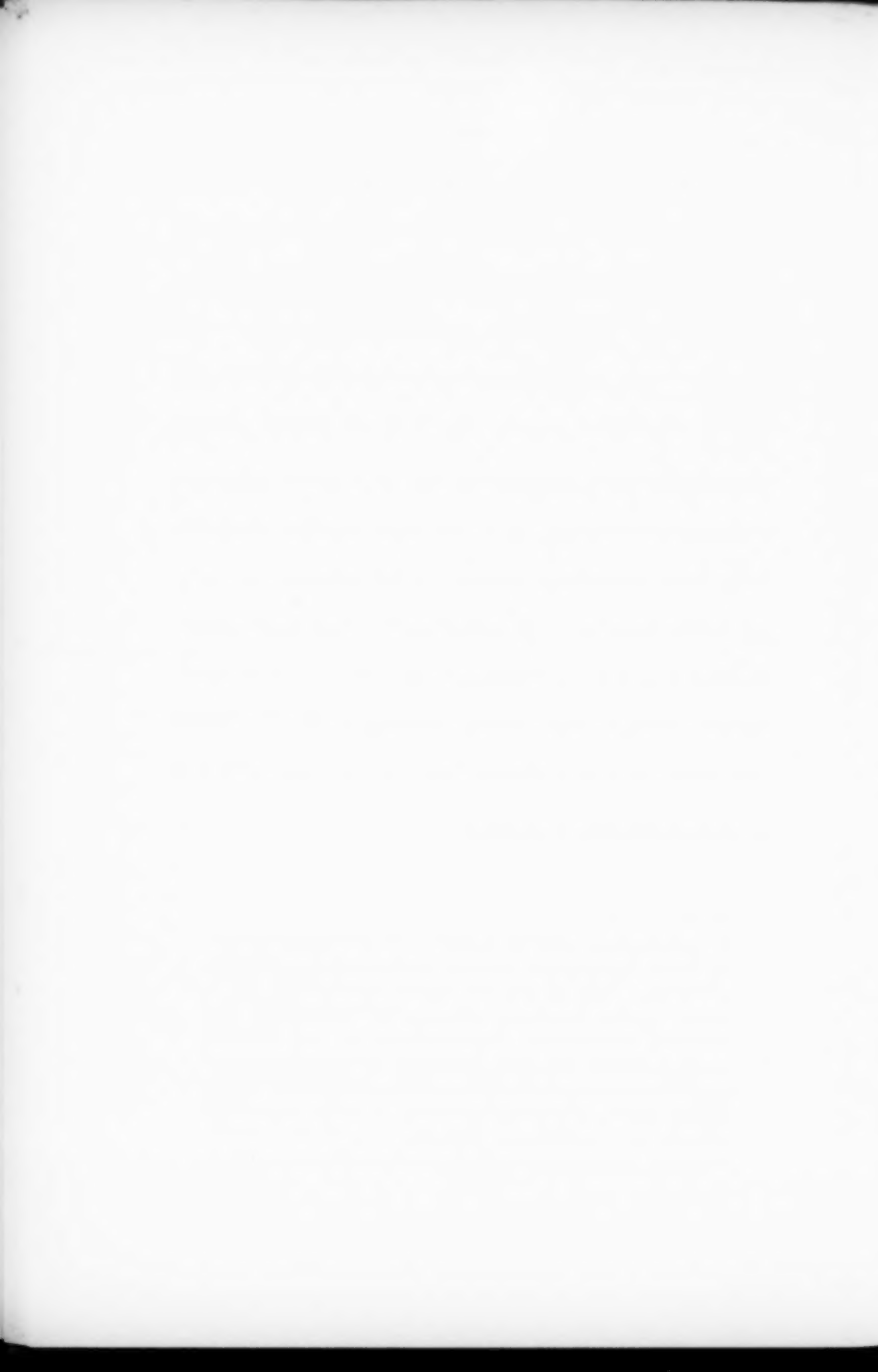
Court as the several opinions in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989) demonstrate. *Amici* are quite certain that the solution does not lie either in committing all accommodation to the unfettered discretion of the legislature, as this Court unfortunately did in *Employment Division v. Smith*, *supra*, or in permitting anything that can plausibly be called an accommodation to pass constitutional muster, a proposition rejected in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

This Court's cases suggest several limitations. Accommodation imposing significant costs or burdens on, or compelling religious conformity of, other persons, will generally be impermissible. *Estate of Thornton v. Caldor, Inc.*, *supra*. There is some evidence that religious conformity is insisted upon here, *J. Mintz, Hasidic People*, *supra*; *Waldman v. UTA*, 147 Misc.2d 529, 558, 558 N.E.2d 781 (Sup.Ct. Orange County, 1990).



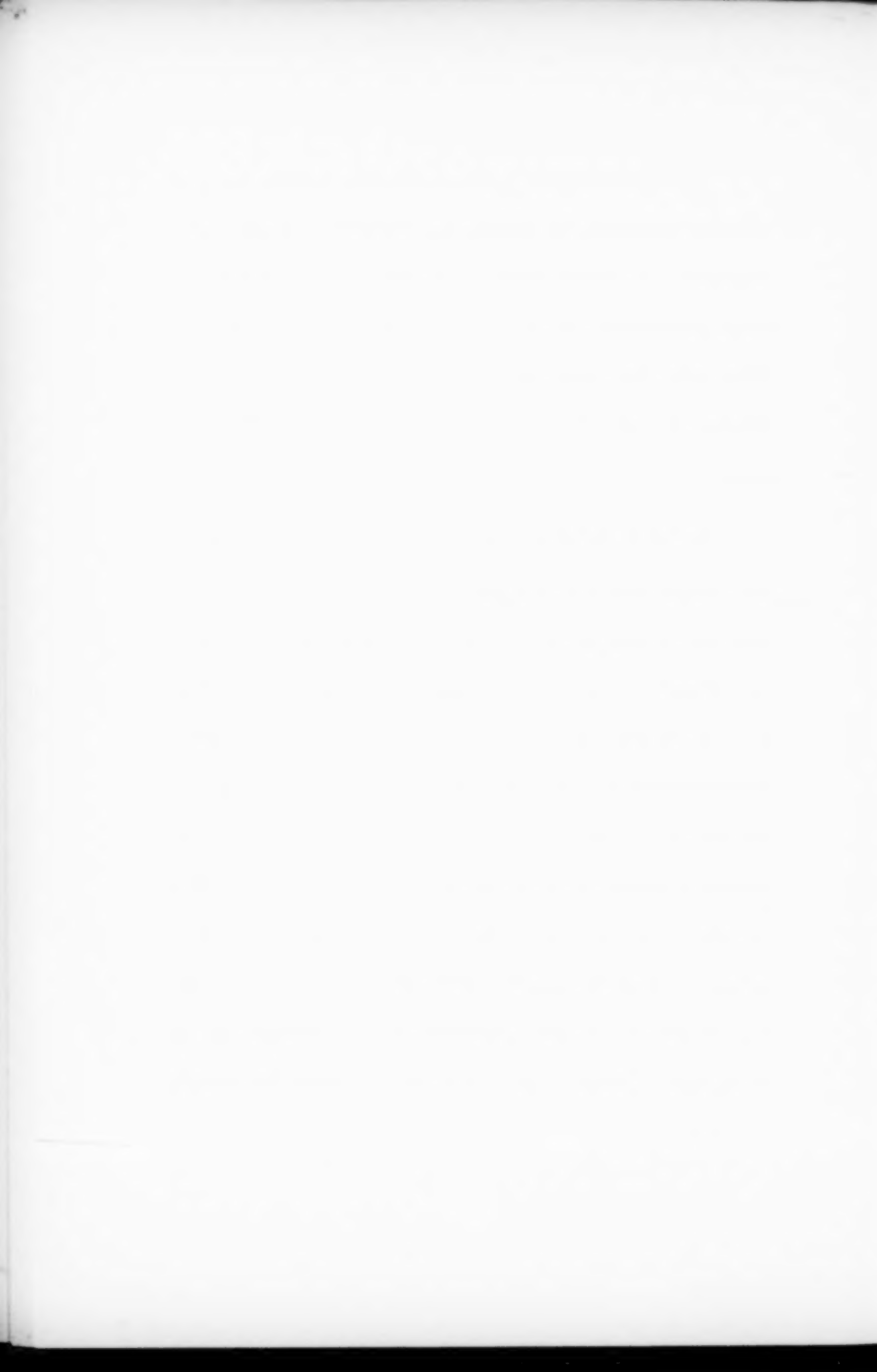
Justice O'Connor has suggested that an accommodation must remove an active state-created burden from the shoulders of the believer, and that, absent such a burden, government support for religion is an establishment, not an accommodation. *Wallace v. Jaffree*, *supra*, 472 U.S. at 81-83. Since Petitioners have disclaimed any separatist religious doctrine that would, as a religious matter, prohibit them from attending classes under secular control, see KJSD Brief at 7, it is difficult to see what state-created burden on religious practice the New York legislature has removed by creating KJSD.²⁵ Under Justice O'Connor's *Jaffree* formulation, too, KJSD is an establishment of religion.

25. Amici are not qualified to pass on the question of whether the Satmar Hasidim have a formal religious mandate requiring separatism. They do note that religion consists of a mix of formal beliefs, mandatory practices or ceremonies, and customary observances. Each faith has its own nuanced version of these principles, frequently unintelligible to the outsider, and always difficult to explain and delineate. These various sources of practice, ceremony or belief may be all religious for constitutional purposes, even if not formally mandated. See Callahan v. Wood, 658 F.2d 679 (9th Cir. 1981).



The problem of accommodation arises from a tension between the Establishment and Free Exercise Clauses. It makes sense to accommodate religion in ways that drain neither Clause of its core meaning. That was the cautious approach taken by Justices Blackmun and O'Connor in *Texas Monthly v. Bullock*, *supra*.

In *Texas Monthly*, the Court invalidated a sales tax exemption for religious periodicals but not for competing secular ones. After explaining why it was so difficult to settle on a precise formulation of a test for distinguishing permissible and impermissible accommodation, Justice Blackmun explained that "a statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable." 489 U.S. at 28. An effort to "create political constituencies along religious lines" is likewise "constitutionally intolerable." Creating such constituencies is not an



accommodation that a government bound by the Establishment Clause can offer.

VI
THE PRESENCE OF CONSTITUTIONAL
MEANS OF DELIVERING EDUCATIONAL
SERVICES DOOMS KJSD

The effort to label KJSD an accommodation of religion despite its utter incompatibility with the Establishment Clause falters for yet another reason -- it is an accommodation far more intrusive on Establishment Clause values than need be to ensure services to the disabled children of Kiryas Joel. Such excessive intrusion leads inescapably to the conclusion that KJSD was created not as an accommodation, but rather as an advancement, of religion, as the New York Court of Appeals held.

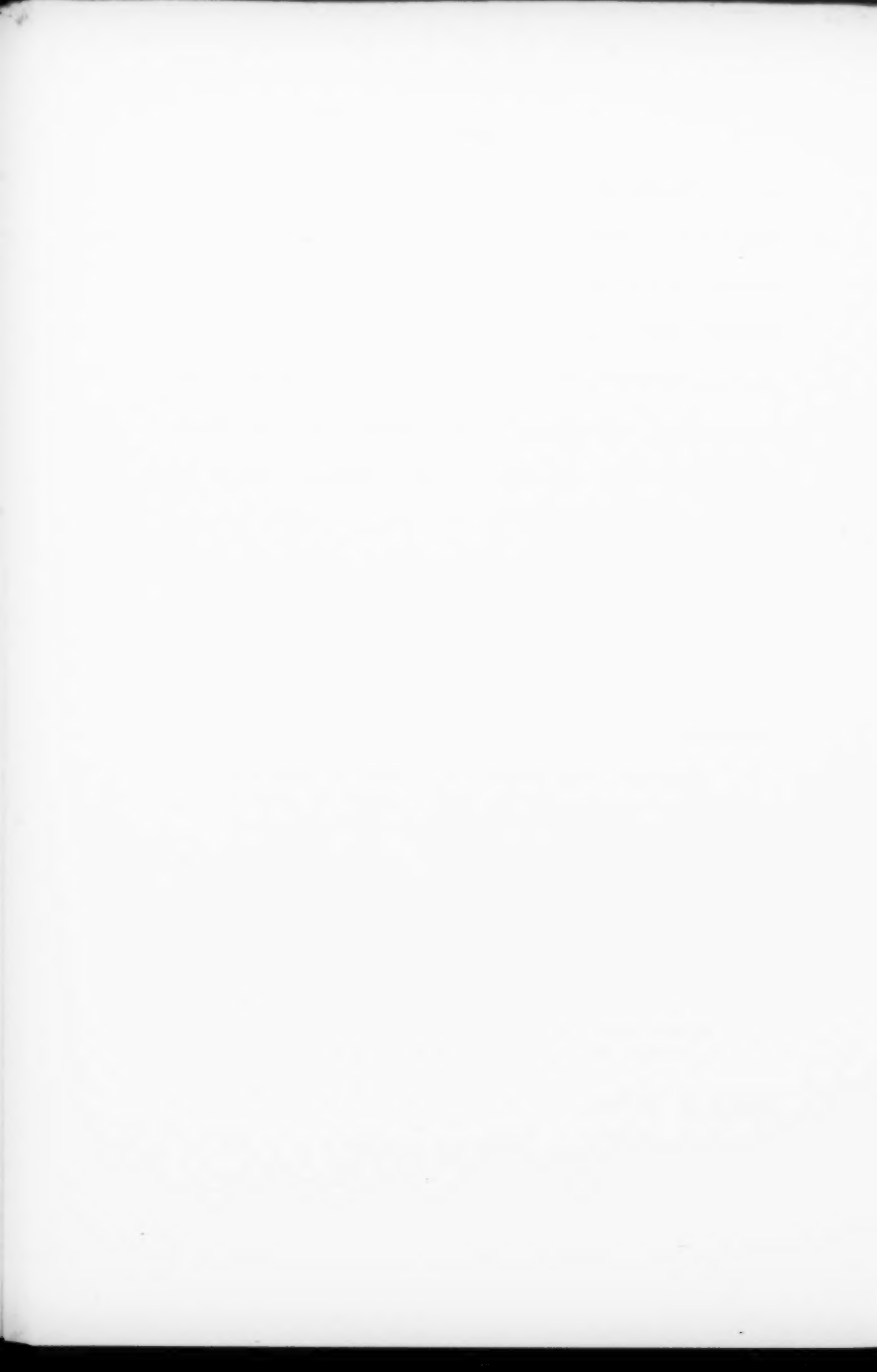
The record suggests that the gap between Hasidic children and their public school peers was so great that it was not educationally feasible to put them in the same classroom. We accept for the moment the truth of these claims. Monroe-Woodbury School District had available to it a ready remedy that would

not have impinged on the Establishment Clause -- the use of a so-called "neutral site," under the control of the Monroe-Woodbury School Board, but serving only Hasidic children. If selected for secular reasons, such as ensuring the educational effectiveness of the instruction provided, or providing bilingual instruction in Yiddish, such neutral siting is constitutional.

Wolman v. Walter, 433 U.S. 229 (1977) is dispositive. There, the Court held that it would be constitutional to provide remedial services to parochial school students in off-premise facilities:

The fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the Court in *Meek*. The influence on a therapist's behavior that is exerted by the fact that he serves a sectarian pupil is qualitatively different from the influence of the pervasive atmosphere of a religious institution. The dangers (of improper effect and entanglement) perceived in *Meek* arose from the nature of the institution, not from the nature of the pupils.

433 U.S. at 244.



Aguilar v. Felton, 473 U.S. 402 (1985) reinforced this rule, even as it emphasized that secular instruction could not take place on the premises of parochial schools. In her dissent, Justice O'Connor explained the majority's ruling:

Our Establishment Clause decisions have not banned remedial assistance to parochial school children, but rather remedial assistance on the premises of the parochial school. Under *Wolman* . . . the New York city classes prohibited by the Court today would have survived Establishment Clause scrutiny if they had been offered in a neutral setting off the property of the private school. (emphasis added)

473 U.S. at 420. The lower federal courts since *Aguilar* have uniformly upheld off-premises arrangements.²⁶

The difference between a neutral site and KJSD is plain. The neutral site would create no political entity along religious lines. No religious group

26. *Barnes v. Cavazos*, 934 F.2d 912 (8th Cir. 1992); *Pulido v. Cavazos*, 966 F.2d 1056 (6th Cir. 1991) (dismissing appeal on procedural grounds; court below in accord); *Walker v. San Francisco U.S.D.*, 761 F.Supp. 1463 (N.D. Cal. 1991), appeal pending (9th Cir.)



controls the neutral site. Students who do not wish to avail themselves of the neutral site, and who prefer to participate in the regular school, are free to do so. Given the existence of KJSD, a disabled student in the Village of Kiryas Joel who desires a public school education is coerced to attend a religiously segregated public school, the equivalent of state imposed racial segregation. And for the reasons expressed in *Wolman*, the neutral site does not otherwise establish religion.²⁷ By contrast, KJSD does all of these forbidden things. It therefore falls on the wrong side of the constitutional line.

27. The New York Court of Appeals recognized that neutral sites were an available alternative, *Bd. of Educ. v. Weider*, 72 N.Y.2d 174, 531 N.Y.2d 889, 527 N.E.2d 767 (1988), but felt itself powerless to order it. This Court, however, has the power to enter such order "as is just", 28 U.S.C. § 2106. In light of ten years of litigation and the urgent need of the Hasidic children for special education, it would seem "just" for this Court to order Petitioner Monroe-Woodbury School District to implement a neutral-site plan, or to cast its mandate so that the New York Court of Appeals may do so.

CONCLUSION

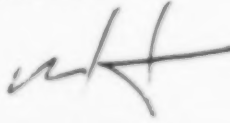
These are perilous times for common school education. The very idea of a common school is under broad attack, and with it the premise, implicit in cases such as *Brown v. Bd. of Educ.*, *supra*, that public schools have an obligation to serve all children.

KJSD dismisses the unfairness of creating a school district for this religious community. It suggests that no other group is likely to be as seriously affected. [KJSD Brief at 46-47.] The claim ignores the many religious communities intensely dissatisfied with the public schools over creationism, outcome based education, sex education and 'secular humanism'. They (and their opponents) would be happy to create fiefdoms of religious or non-religious homogeneity if this Court confers its constitutional blessings on KJSD.



When all is said and done, this is an easy case.

The judgment below must be affirmed.



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February 23, 1994



APPENDIX



APPENDIX A

MEMBER ORGANIZATIONS OF THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL

Birmingham JCC
Greater Phoenix Jewish Federation
Tucson Jewish Federation of Southern Arizona
Greater Long Beach and West Orange County
Jewish Community Federation
Los Angeles CRC of Jewish Federation-Council
Oakland Greater East Bay JCRC
Orange County Jewish Federation
Sacramento JCRC
San Diego CRC of United Jewish Federation
San Francisco JCRC
Greater San Jose JCRC
Greater Bridgeport Jewish Federation
Greater Danbury CRC of Jewish Federation
Eastern Connecticut Jewish Federation
Greater Hartford CRC of Jewish Federation
New Haven Jewish Federation
Greater Norwalk Jewish Federation
Stamford United Jewish Federation
Waterbury Jewish Federation
JCRC of Connecticut
Wilmington Jewish Federation of Delaware
Greater Washington JCC
South Broward Jewish Federation
Greater Fort Lauderdale Jewish Federation
Jacksonville Jewish Federation
Greater Miami Jewish Federation
Greater Orlando Jewish Federation
Palm Beach County Jewish Federation
Pinellas County Jewish Federation
Sarasota-Manatee Jewish Federation
South County Jewish Federation
Atlanta Jewish Federation
Savannah Jewish Council

NJCRAC MEMBER ORGANIZATIONS

A-2

Metropolitan Chicago JCRC of the Jewish
United Fund
Peoria Jewish Federation
Springfield Jewish Federation
Indianapolis JCRC
South Bend Jewish Federation of St. Joseph Valley
JCRC of Indiana
Greater Des Moines Jewish Federation
Lexington Central Kentucky Jewish Federation
Louisville Jewish Community Federation
Greater Baton Rouge Jewish Federation
Greater New Orleans Jewish Federation
Shreveport Jewish Federation
Portland Southern Maine Jewish
Federation-Community Council
Baltimore JCRC
Greater Boston JCRC
Marblehead North Shore Jewish Federation
Greater New Bedford Jewish Federation
Springfield Jewish Federation
Worcester Jewish Federation
Metropolitan Detroit JCC
Flint Jewish Federation
Minneapolis Minnesota and Dakotas JCRC-
Anti-Defamation League
Greater Kansas City Jewish Community
Relations Bureau
St. Louis JCRC
Omaha JCR Committee of Jewish Federation
Atlantic County Federation of Jewish Agencies
Central New Jersey Jewish Federation
Clifton-Passaic Jewish Federation
Delaware Valley Jewish Federation
Metrowest United Jewish Federation
Greater Middlesex County Jewish Federation
Northern New Jersey JCRC
Southern New Jersey JCRC of Jewish Federation
Albuquerque JCC
Binghamton Jewish Federation of Broome County
Greater Buffalo Jewish Federation

NJCRAC MEMBER ORGANIZATIONS

A-3

Elmira CRC of Jewish Welfare Fund
Greater Kingston Jewish Federation
Northeastern New York United Jewish Federation
Greater Orange County Jewish Federation
Rochester Jewish Community
Syracuse Jewish Federation
Utica Jewish Federation
Akron Jewish Community Federation
Canton Jewish Community Federation
Cincinnati JCRC
Cleveland Jewish Community Federation
Columbus CRC of Jewish Federation
Greater Dayton CRC of Jewish Federation
Greater Toledo CRC of Jewish Federation
Youngstown JCRC of Jewish Federation
Oklahoma City JCC
Tulsa JCC
Portland Jewish Federation
Allentown CRC of Jewish Federation
Erie JCC
Greater Philadelphia JCRC
Pittsburgh CRC of United Jewish Federation
Scranton-Lackawanna Jewish Federation
Greater Wilkes-Barre Jewish Federation
Providence CRC of Rhode Island Jewish Federation
Charleston JCR Committee
Columbia CRC of Jewish Welfare Federation
Memphis JCRC
Nashville and Middle Tennessee Jewish Federation
Austin JCC
Greater Dallas JCRC of Jewish
Community Federation
El Paso JCR Committee
Fort Worth Jewish Federation
Greater Houston Jewish Federation
San Antonio JCR of Jewish Federation
Newport News-Hampton United Jewish Community of
the Virginia Peninsula
Richmond Jewish Community Federation
Tidewater United Jewish Federation

NJCRAC MEMBER ORGANIZATIONS

A-4

Greater Seattle Jewish Federation
Madison JCC
Milwaukee Jewish Council

FEB 23 1994

CLERK OF THE CLERK

Nos. 93-517, 93-527, and 93-539

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL
VILLAGE SCHOOL DISTRICT, BOARD OF EDUCATION
OF THE MONROE-WOODBURY CENTRAL SCHOOL
DISTRICT AND ATTORNEY GENERAL OF THE
STATE OF NEW YORK,

*Petitioners,**-against-*

LOUIS GRUMET AND ALBERT W. HAWK,

Respondents.

ON WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENTS
BY THE NATIONAL COALITION FOR PUBLIC EDUCATION
AND RELIGIOUS LIBERTY AND
THE NATIONAL EDUCATION ASSOCIATION, ET AL.

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February 23, 1994

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U.S. Constitution amend. I	<i>passim</i>
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INTEREST OF *AMICI CURIAE*

Letters of the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

The National Coalition for Public Education and Religious Liberty (National PEARL) is a national coalition of organizations sharing the objective of preserving religious freedom and the separation of church and state in public education.

The National Education Association (NEA) is a nationwide labor organization with a current membership of more than two million persons, the vast majority of whom are employed by public school districts, colleges, and universities. NEA has long been a strong supporter of separation of church and state in public education.

The members of National PEARL joining this brief are:

American Association of University Women
American Humanist Association
American Jewish Congress
Americans for Religious Liberty
Anti-Defamation League of B'nai B'rith
Baptist Joint Committee
Council for Democratic and Secular Humanism
Michigan Council About Parochiaid
Monroe Citizens for Public Education and Religious
Liberty (McPEARL)
National Center for Science Education
National Parent Teachers Association
New York Committee for Public Education and
Religious Liberty (New York PEARL)
Ohio PEARL
Unitarian/Universalist Association

STATEMENT OF FACTS

This case involves the constitutionality of a New York State statute that vests the governmental power to operate a public school district in a community that functions as a religious establishment. The New York Court of Appeals affirmed the lower court decisions and held that the law was unconstitutional on its face.

The Village of Kiryas Joel is a municipality located in Orange County, New York. All of its residents are Satmar Hasidic Jews who live in isolation under rabbinical authority. In the 1970s, the Satmars moved from Brooklyn to the Town of Monroe in Orange County, New York, to establish a religious community. Shortly after moving to Monroe, the Satmars became embroiled in zoning disputes with local authorities. The residents opted to self-incorporate as an independent municipality rather than to comply with existing Monroe law. The Supervisor of the Town of Monroe, who authorized the incorporation, found that the Satmars were seeking segregation from the larger community on the basis of religion.

For the last five years, the village has imposed religious restrictions on persons who wish to move into the community by requiring advance religious approval. The community also imposes a \$10,000 fee, which is used to support the Congregation Yetev Lev, on anyone who builds a new residence in Kiryas Joel. Those who already reside in Kiryas Joel must obey the rabbinical leadership or face expulsion from the Congregation and its affiliated religious schools.

The village's governmental and religious institutions, including the educational institutions, operate under rabbinical authority. Prior to this dispute, Kiryas Joel had never needed nor been interested in having its own public school district. The non-disabled children in Kiryas Joel are educated in private religious schools affiliated with the Congregation. Monroe-Woodbury Central School District initially provided the services

for Kiryas Joel's disabled students in an annex to one of the religious schools. After 1985, Monroe-Woodbury provided the services in its existing public schools, none of which was located in Kiryas Joel. The Satmar parents, however, refused to send their children to public schools outside Kiryas Joel for a number of reasons, including concerns about acculturation and whether the children would be accepted in the Satmar community if they were exposed to the alien culture of the larger community.

The New York State Legislature passed Chapter 748 of the Laws of 1989 for the express purpose of creating a magnet school to provide special education services to disabled hasidic children throughout Orange County. No one intended the school district would be fully operational or expected that any other public schools would be established in Kiryas Joel. Instead, it was expected that, if non-Satmars were ever to live in Kiryas Joel, they would be bused to public schools outside of the Village. To date, the Sha'arei Hemlah school for the disabled is the only public school in the district.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petitioners do not squarely address the most obvious and most important issue in this case: the constitutionality of vesting the power to operate a public school district in a municipality that functions as a religious establishment.

Where, as here, a law is challenged on its face under the Establishment Clause, the "inquiry [begins] with a consideration of the nature of the institutions in which the [challenged] programs operate.'" *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988) (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 384 (1985)).^{1/} The institution in which the challenged program

^{1/} This case comes before this Court on a facial challenge to the constitutionality of a New York law granting Kiryas Joel "all the powers and duties of a union free school district." 1989 N.Y. Laws Chapter 748 ("Chapter 748"). The text of Chapter 748 is included in the Appendix to this brief.

Petitioners incorrectly state that the "operation of the Kiryas Joel public school under the current school board has not been challenged in this purely facial attack on Chapter 748." (KJ Br. at 35.) The record reflects, however, that the operations of the Sha'arei Hemlah school were challenged below. *See, e.g.*, (R. at 424-27, 500, 502-04, 511-13.) The statute is being challenged facially not because anyone concedes that Kiryas Joel's Sha'arei Hemlah school for the disabled operates within constitutional parameters, but because: (a) the Complaint was filed before the school became operational; (b) the respondents (plaintiffs below) moved for summary judgment based upon a facial challenge; and (c) discovery is not complete with respect to the operations of the Sha'arei Hemlah school or the school board. The Second Amended Complaint is not limited to a facial challenge of the constitutionality of the statute. *See* Second Amended Complaint, (R. at 311). The complaint alleges that the school will have impermissible effects, (R. at 339), and that the statute violates state education law, (R. at 341-43). Accordingly, if Respondents' facial challenge is not upheld here, this case must be remanded for further proceedings.

operates here is the Village of Kiryas Joel. Unlike any other municipality in the state of New York, Kiryas Joel was created for the express purpose of segregating citizens on the basis of their religious beliefs. Once established, the village institutionalized overt discrimination against those who did not adhere to the sole religious faith, Satmar Hasidism. The explicit segregationist goals have proved successful, for, as Petitioners admit, "Kiryas Joel's residents are all currently Satmar Hasidim" (KJ Br. at 34.) Having created a religious establishment, Kiryas Joel now seeks this Court's approval to exercise the governmental power of operating a public school district.

Never before has this Court permitted discretionary governmental powers to be granted to a community that functions as a religious establishment. In the case most squarely on point, where a statute granted discretionary governmental powers to a religious community, an eight-member majority of this Court struck down the statute and concluded that "delegating a governmental power to religious institutions . . . inescapably implicates the Establishment Clause." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982).

Petitioners seek to divert this Court's attention from Kiryas Joel's unequivocal religious establishment by appealing to the emotionally compelling issue of providing education for the disabled. Despite the fact that the challenged law says *nothing* about a school for the disabled, Petitioners recognize that they are on safer ground arguing for aid to the handicapped than in justifying the "nature of the institutions in which the [challenged] programs operate." *Kendrick*, 487 U.S. at 610.

The Amici respect the Satmars' religious beliefs that lead them to separate themselves from the larger community. The Satmars' beliefs are and should be fully protected by the First Amendment. But the same First Amendment that protects the

Satmars' choice also prohibits them from creating a religious establishment that operates a public school district.

ARGUMENT

I. CHAPTER 748 VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT GRANTS DISCRETIONARY GOVERNMENTAL POWER TO A COMMUNITY THAT FUNCTIONS AS A RELIGIOUS ESTABLISHMENT.

As Petitioners candidly acknowledge, "everyone who lives in Kiryas Joel today is a devoutly Orthodox Jew." (KJ Br. at 16.)^{2/} The "residents of the Village are Satmar Hasidic Jews — devoutly religious people who reside in an insular community where religious ritual is scrupulously followed." (KJ Br. at 3.) But Petitioners suggest that the prevalence of Satmars in Kiryas Joel, and the lack of non-Satmars, simply reflects free choices made by "people who happen to be religious" (KJ Br. at 23.) They further argue that it is "only natural" that elected officials will "mirror the citizens of the community," (KJ Br. at 34), and that there is nothing impermissible in the fact that "religious and secular interests coincide," (KJ Br. at 22).

Petitioners mischaracterize the Satmar community at Kiryas Joel. Not only was the municipality originally established for the purpose of segregating citizens on the basis of their religious beliefs, it has subsequently merged the functions of religion and

^{2/} "KJ Br. at __" refers to Brief for Petitioner Board of Education of the Kiryas Joel Village School District. "MW Br. at __" refers to Brief for Petitioner Board of Education of the Monroe-Woodbury Central School District. "NY Br. at __" refers to Brief for Petitioner Attorney General of the State of New York. "R. at __" refers to the printed record filed in the New York Court of Appeals. "J.A. at __" refers to the Joint Appendix.

government to enforce segregation on the basis of belief and to discriminate against those who do not adhere to the views of the prevailing establishment.

A. The Village of Kiryas Joel was originally created for the purpose of segregating citizens on the basis of their religious beliefs.

The Satmars first moved to the Town of Monroe, New York, in 1974. Jerome R. Mintz, *Hasidic People: A Place in the New World* 206-07 (Harvard University Press, 1992). At that time, Monroe was recognized as a community with broad religious tolerance that had already welcomed several distinctive religious minorities. In describing the Satmars' move to the town, the *Encyclopaedia Judaica Year Book* explained that Monroe "is already a place with some diversity: there is a Jesuit retreat, a Hare Krishna ashram, and a Jehovah's Witness convention center."^{3/}

Within two years of their arrival, however, the Satmars had become entangled in disputes with the local government. Zoning disputes broke out because the Satmars' new multi-family apartment buildings did not conform to the town's single-family zoning requirement. See W.C. Rogers, Decision on Sufficiency of Petition [for Incorporation of Kiryas Joel], Dec. 10, 1976 ("Incorporation Decision"), (J.A. at 8-13);^{4/} see also Mintz, *Hasidic People* 207.

Rather than agreeing to comply with the pre-existing zoning requirements of the town to which they had voluntarily moved,

^{3/} *Encyclopaedia Judaica Year Book: Events of 1974/75* 419 (1975/76).

^{4/} W.C. Rogers was Monroe's Town Supervisor. The Incorporation Decision permitted Kiryas Joel to conduct a referendum and thereby self-incorporate.

the Satmars followed the injunction of their Grand Rebbe, Joel Teitelbaum, who "forbade the hasidim living in his community to cooperate with state institutions" 15 *Encyclopaedia Judaica* 910 (1972).^{5/} Accordingly, the Satmars took advantage of a rarely used provision of New York's village law and petitioned for the self-incorporation of a community to be named in honor of their religious leader, the Grand Rebbe Joel Teitelbaum. Incorporation Decision, (J.A. at 8-9).^{6/} The Satmars thus sought to carve out a village from the middle of the surrounding Town of Monroe.

Supervisor Rogers's Incorporation Decision, which created the new Village of Kiryas Joel, explained that the reason for the incorporation of Kiryas Joel was not consistent with the purpose for which the self-incorporation law had been created. (J.A. at 9-10.)^{7/} New York's village law had been designed for the purpose of helping small communities self-incorporate in order to obtain needed services such as water, sewer, and fire protection. (J.A. at 9.) But, Supervisor Rogers found, those services were already fully available to the residents of the community. (J.A. at 9-10.)

The actual reason for carving out Kiryas Joel, the Incorporation Decision revealed, "lies in the makeup of the

^{5/} Petitioners acknowledge the authority of the *Encyclopedia Judaica*. See (KJ Br. at 14 n.6.)

^{6/} "Kiryas Joel" means "the community of Joel." (J.A. at 8.) Reb Joel Teitelbaum was the Grand Rebbe of the Satmars at the time Kiryas Joel was incorporated. He died in 1982 and was succeeded as Grand Rebbe by his nephew, Moshe Teitelbaum.

^{7/} Even though the petition was not consistent with the purpose of the law, Supervisor Rogers found that the petition was technically sufficient and approved it. (J.A. at 15.)

individuals who will reside within the new village These residents are and will be all of the Satmar Hasidic persuasion." (J.A. at 10.) The reason for the incorporation thus had nothing to do with unavailable services or with a sensible geographical division of the town,^{8/} but was designed instead to segregate citizens on the basis of their religious beliefs and to establish a municipality operated by the Satmars. (J.A. at 10.)

Separation from the larger community on the basis of religion is a deeply ingrained aspect of Satmar religious practice. The trial court below found that the Satmars' "articulated goal is to remain segregated from the rest of society." *Grumet v. New York State Educ. Dep't*, 579 N.Y.S.2d 1004, 1007 (N.Y. Sup. Ct. 1992). The New York Court of Appeals, in a related case, found that the Satmars of Kiryas Joel believe in "separation from the outside community." *Board of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder*, 527 N.E.2d 767, 769, (N.Y. 1988). The Second Circuit, in yet another case involving the Satmars, held that their practices include a "desire to keep their children separate." *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1241 (2d Cir. 1986). The Satmars have resisted, for example, sending their children to schools with other children who also are minorities. "[T]hey are reported as seeing Hispanics as 'different' and 'not a good influence on [the Hasidic] girls,' and as believing that educating Hasidic children in the company of Hispanic children would 'corrupt[] the Hasidic children,'" *id.* (citation omitted).^{9/}

^{8/} Compare Petitioner's argument justifying the constitutionality of the Kiryas Joel school district that merely "sets up a school district that is defined *geographically*." (KJ Br. at 20) (emphasis in original).

^{9/} Amici are mystified by Petitioners' statements that separatism is not part of the "Satmar faith," (KJ Br. at 4 n.1), and that the basis of their claims arise only from "cultural" motivations, (KJ Br. at 29). Although
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Thus, from Kiryas Joel's inception, this Court's decisions were ignored: "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 796 n.54 (1973) (citing *Lemon v. Kurtzman* 403 U.S. 602, 622 (1971)). The petitioners have identified no other municipality in New York — or anywhere else in the United States for that matter — that, like Kiryas Joel, was created for the express purpose of segregating citizens on the basis of religion.^{10/}

^{9/}(...continued)

Petitioners deny that separatism is a part of the Satmar faith when making their Establishment Clause arguments, they freely switch their position when seeking the benefits of the Free Exercise Clause:

Chapter 748 has, at most, the effect of accommodating the *needs* of a community of devoutly religious people. The statute does no more than ameliorate a *burden that results from the free exercise of religion*. Without Chapter 748, a *community that has chosen to live together to preserve its religious heritage and practices* will be unable to educate its disabled children to live in the modern world.

(KJ Br. at 40) (emphasis added). Thus Petitioners seek to evade Establishment Clause proscriptions by arguing that they have only *cultural* reasons for not attending public schools and for insisting on having their own school district, but then argue that they are "burdened" under the Free Exercise Clause when their separatism is not accommodated by the government. Such an inconsistency not only undercuts the credibility of their assertions, it undermines their free exercise claims as well. See *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) ("social values" and "philosophical and personal" values do "not rest on a religious basis" and thus do "not rise to the demands of the Religion Clauses").

^{10/} Political communities with overtly religious goals invariably trigger Establishment Clause disputes. Whether the issue is the renaming of the town of Antelope, Oregon as "Rajneeshpuram," or admitting Utah as a
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B. The Village of Kiryas Joel merges religion and government and thus operates as a religious establishment, not as a secular municipality.

After side-stepping the fact that Kiryas Joel was established to promote religious segregation, Petitioners insist that the demographic dominance of the Satmars is now a result of free choice. Thus in Petitioners' portrayal of an idyllic Kiryas Joel, municipal officials are elected not because the winning candidates are endorsed by a Rebbe and the opposition candidates are excommunicated and have their children expelled from the only schools in the village, but because the elected officials simply "mirror" the religious composition of the village. Petitioners' idyllic Kiryas Joel is not the real Kiryas Joel.

1. Religious leaders control the community and municipal elections. The Satmar community is centered around the Grand Rebbe. Aff. of Israel Rubin ¶ 8, (R. at 492); *see also* Israel Rubin, *Satmar: An Island in the City* (1972), (R. at 428, 433). The Grand Rebbe, who is the leader of the worldwide Satmar community, is the "ultimate decision-maker in all matters of concern to the Satmar community." Rubin Aff. ¶ 9, (R. at 493).

¹⁰(...continued)

state, this country correctly repudiates governmental entities created for ostensibly religious purposes.

[T]he closest and most inseparable relation of church and state exist in Utah. These things ought not to be, and in our opinion no Territory dominated by such principles and conditions should, while they exist, be admitted into the Union, at least until a sufficient number of non-Mormon citizens shall have located in that Territory to make it reasonably certain that the Mormon Church shall not be able to control the political and secular affairs of the new State.

H.R. Rep. No. 4156, 50th Cong., 2d Sess. (Views of the Minority) at 73 (1889).

The current Grand Rebbe appointed his son, Aaron Teitelbaum, to be the Rabbi of Kiryas Joel. Mintz, *Hasidic People* 209. The New York Supreme Court, which previously had occasion to inquire into the operations of Kiryas Joel, found that "Rabbi [Aaron Teitelbaum] controls the educational affairs of the community. . . ." *Waldman v. United Talmudical Academy*, 558 N.Y.S.2d 781, 783 (N.Y. Sup. Ct. 1990). As the person who controls both the congregation and the schools, Rabbi Aaron Teitelbaum is the *de facto* leader of the Kiryas Joel community. "As both rov and rosh yeshivah, Rabbi Aaron Teitelbaum has *authority over all activities in the Kiryas Joel community*." Mintz, *Hasidic People* 209-10 (emphasis added).^{11/}

Rabbi Aaron Teitelbaum uses his power not simply on matters of religious faith and practice, but to control the outcome of municipal elections in Kiryas Joel. For example, when Joseph Waldman, a Kiryas Joel resident, ran for public office without first receiving Teitelbaum's approval, Waldman's six children were summarily expelled from the village schools even though it was "undisputed that the children have exemplary school records" *Waldman*, 558 N.Y.S.2d at 782. The New York Supreme Court held hearings on the expulsion of the candidate Waldman's children and found that the expulsion had been arbitrary and in violation of New York law. The court ordered the Rabbi to reinstate the children, but he refused to do so until after he was found in contempt of court and ordered to pay a fine of \$250 per day. *Id.* at 783.^{12/} His father, the Grand Rebbe, similarly exercises political control over the congregation:

^{11/} The "rov" is the chief rabbi, the "rosh yeshivah" is the ultimate authority in the yeshivah.

^{12/} The background of the Waldman decision is described in Mintz, *Hasidic People* 317-18.

[t]he Rebbe named the gabbai and exercised his power to have his own people in positions elected by the community: the president (a secular post) and the board of directors. 'After the last election the Rebbe didn't like the results and so he nullified them and put in his own people.'^{13/}

When the children of a dissenting candidate for public office are illegally ousted from the village's schools because their father did not receive permission from the religious leader of the community, as the New York Supreme Court found in *Waldman*, religion and the municipality have become too intertwined with each other.^{14/}

^{13/} Mintz, *Hasidic People* 211 (citation omitted). The "gabbai" is the person appointed to correct the reading of the Torah.

The electoral disputes in Kiryas Joel have already proved the accuracy of the warnings made by Justices Harlan and Black:

As Mr. Justice Black's opinion in *Everson v. Board of Education* . . . emphasizes, competition among religious sects for political and religious supremacy has occasioned considerable civil strife, 'generated in large part' by competing efforts to gain or maintain the support of government. As Mr. Justice Harlan put it, '[w]hat is at stake as a matter of policy [in Establishment Clause cases] is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.'

Nyquist, 413 U.S. at 795-96 (citations omitted).

^{14/} This Court recently quoted James Madison's prophetic warning about the undesirable consequences that result when religious establishments obtain political powers: "experience witnesseth that ecclesiastical
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2. *Kiryas Joel imposes religious restrictions on persons seeking residency in the village.* Without any citation to the record, Petitioners state baldly that "no one is excluded from the Village on the grounds of race or religion [but] only members of the Satmar community have, thus far, chosen to live in Kiryas Joel." (KJ Br. at 4); *see also* (KJ Br. at 16) (Kiryas Joel is "inhabited entirely by individuals who have voluntarily chosen to live together"), (KJ Br. at 20) ("no one is excluded from the Village on the grounds of race or religion"). When seeking a writ of certiorari, Petitioners also wanted this Court to believe that "[t]here are no restrictive covenants prohibiting alienation of the parcels to non-Satmarer." (MW Pet. Br. at i.)

In fact, Kiryas Joel imposes strict religious restrictions on persons who might wish to move into the community and on builders who might wish to construct housing in the community. Kiryas Joel announced its restrictive housing policy in a proclamation published in the *Kiryas Joel Bulletin* that was subsequently distributed to the greater hasidic community in *Der Yid: Voice of American Orthodox Jewry*. A mere three months before New York enacted Chapter 748, the leaders of Kiryas Joel announced:

(A) *It is forbidden for any contractor or owner of a house, in our village, to sell or rent an apartment in Kiryas Joel to a new resident without receiving permission in advance, in writing, from the Organization allocated for this purpose. This application has to be signed by the Organization.*

¹⁴(...continued)

establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." *Lee v. Weisman*, 112 S. Ct. 2649, 2657 (1992).

(B) Without having received this permission, it will also not be permitted to become a member of our congregation, and the children will not be allowed to attend the community's school (boys and girls).

The application can be obtained at the office of our Congregation

Kiryas Joel Bulletin, Feb.-Mar. 1989, at 30, reprinted in *Der Yid*, Feb. 3, 1989, at 19.^{15/} Thus, contrary to Petitioners' unsupported claims suggesting an absence of religious restrictions in Kiryas Joel, the community's actual policy has been fully disclosed in the village's own *Bulletin* as well as to the greater hasidic community.

Moreover, Kiryas Joel imposes a \$10,000 fee to support the Congregation Yetev Lev on any person who wishes to build a home in Kiryas Joel. In sworn testimony before the Hon. Irving Kramer, Kiryas Joel Mayor Leopold Lefkowitz not only acknowledged that such a fee was imposed, he sought to justify it.

Q. Do you know if there is a law in Kiryas Joel which requires that a builder of apartments must pay \$10,000 to Congregation Yetev Lev?

A. I think so. I will tell you the reason too.

Q. Please.

^{15/} Twelve copies of each publication and their translations have been lodged with the Supreme Court Clerk's Office.

- A. There are many families there, ten children to a family, the average is ten children to a family, and so that they might continue, so that in order that education may be continued, the builder of a house has to contribute \$10,000.

Leopold Lefkowitz Dep., June 24, 1993, at 412-13, *Congregation Yetev Lev D'Satmar v. 26 Adar N.B. Corp.*, No. 13224-90, (N.Y. Sup. Ct.).^{16/}

- Q. Can a builder build in Kiryas Joel without paying \$ 10,000 to Yetev Lev?

THE WITNESS: I think that he must pay that \$10,000.

Id. at 423. Thus, not only must would-be residents of the municipality first obtain permission from a special religious committee, but they also must pay an up-front fee of \$10,000 to support the religious congregation.

3. Kiryas Joel merges religion and government in the Municipal Building. Although the purported "secular" appearance of Kiryas Joel's Sha'arei Hemlah school for the disabled is not relevant for this facial analysis of Chapter 748, Petitioners repeatedly raise the issue despite the fact that their assertions have not been tested by discovery. (KJ Br. at 22-23, 28); (MW Br. at 25); (NY Br. at 18). But in raising this issue, Petitioners acknowledge that the non-sectarian appearance of public buildings is an important factor in determining compliance with the Establishment Clause. Thus they report "the very significant absence of mezuzahs on the doorposts" at the Sha'arei

^{16/} Twelve copies of the relevant pages of Mayor Lefkowitz's deposition have been lodged with the Supreme Court Clerk's Office.

Hemlah school. (MW Br. at 25.)^{17/} School Superintendent Benardo similarly notes that there are no mezuzahs at the school. Aff. of Steven Benardo ¶ 11, (R. at 738); *see also* (NY Br. at 18) ("no religious symbols" at the school).

But if it is "very significant" that the school has no mezuzahs, it is equally significant that mezuzahs are publicly and fully displayed on both the exterior and interior doors of the Kiryas Joel Municipal Building.^{18/} Indeed the Municipal Building at Kiryas Joel contains not only the "secular" Water Department and Head Start Program, it also contains the offices of the sectarian United Talmudic Academy Torah V'Yirah and the Mid-Hudson School of Judaic Studies. Kiryas Joel's Mayor, Leopold Lefkowitz, no doubt finds it convenient to have the municipal offices and yeshivah offices combined because, as he acknowledged in his deposition, not only is he the Mayor of the village, but he also serves as President of the Congregation Yetev Lev D'Satmar and as President of the United Talmudic Academy Torah V'Yirah. Leopold Lefkowitz Dep., at 445, 448.^{19/}

^{17/} The mezuzah is a "scroll enclosed in a case that is affixed to all the doorposts in a Jewish home in fulfillment of the biblical injunction: 'And you shall write them (the words of God) upon the posts (mezuzot) of your house and on your gates' (Deut. 6:9; 11:20)." *Perennial Dictionary of World Religions* 479 (Keith Krim ed., 1989).

^{18/} The placement of mezuzahs on the doors of the Municipal Building is the equivalent of a predominantly Catholic community placing crosses on all of the doors of a Town Hall.

Under the Federal Rules of Evidence, a court may take judicial notice of facts that are "generally known within the territorial jurisdiction of the trial court" Fed. R. Evid. 201(b)(1). The Municipal Building, which is open to the public, is located at 500 Forest Road in Kiryas Joel.

^{19/} *See* n.16 *supra*.

When religious affiliation is used as a basis for creating a municipality, it should not be surprising that religion and government would thereafter permeate each other in that municipality. Such is the case at Kiryas Joel, where the institutions, officials, and electoral process all entwine church and state. To the extent that Petitioners believe that there is nothing exceptionable in the fact that Kiryas Joel "happens" to be inhabited by the members of a single religious faith, we invite them in their reply briefs to identify other municipalities in the United States that: (a) were originally created for the purpose of segregating on the basis of religion; (b) require residents to be approved by a religious committee; (c) impose religious fees; (d) permanently place religious symbols on public buildings; and (e) operate public school districts.

C. Discretionary governmental power may not be vested in a community that functions as a religious establishment.

Kiryas Joel thus is not, as Petitioners would have this Court believe, a community with the incidental characteristic of being populated by a Satmar majority. Rather, by any reasonable standard, the community operates as a religious establishment. Indeed, it would take willful blindness to believe that a municipality, which was created in order to segregate on the basis of adherence to the Satmar faith and that actively excludes persons whose religious beliefs and practices are unacceptable, could be anything other than a religious establishment. Because the Establishment Clause forbids municipalities from operating as religious establishments, it *a fortiori* forbids religious communities, like Kiryas Joel, from receiving the additional discretionary governmental powers provided by Chapter 748.

This Court has recognized that discretionary governmental powers may not be delegated to religious communities. An eight-member majority of this Court held that the government

breaches the Establishment Clause when it "vest[s] discretionary governmental powers in religious bodies." *Larkin*, 459 U.S. at 123.^{20/} In deciding that the Establishment Clause was breached by legislation that rather modestly permitted religious institutions to veto the granting of liquor licenses within 500 feet of their churches, the Court held that the "'objective is to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other.'" *Id.* at 126 (quoting *Lemon*, 403 U.S. at 614). The *Larkin* Court stressed that this doctrine is not new, but began with the "Framers [who] did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Larkin*, 459 U.S. at 127.

This Court recently reaffirmed the core principle of *Larkin*: the government "may not delegate a governmental power to a religious institution" *County of Allegheny v. ACLU*, 492 U.S. 573, 590-91 (1989). While dissenting from the Court's judgment, Justices Kennedy, White, and Scalia nevertheless concluded that:

It is no surprise that without exception we have invalidated actions that further the interests of religion through the coercive power of government. *Forbidden involvements include . . . delegating government power to religious groups.*

Id. at 660 (Kennedy, J. concurring in the judgment in part and dissenting in part) (internal citations omitted) (emphasis added).

^{20/} The sole dissenter in *Larkin*, then-Justice Rehnquist, nevertheless recognized elsewhere that the Establishment Clause "forbade preference among religious sects or denominations." *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting). In granting discretionary governmental powers to Kiryas Joel, the state legislature ratified a single religion's dominance of the community.

If the modest power to veto the granting of liquor licenses in *Larkin* violates the Establishment Clause, then surely the greater power to operate one, five, or no public schools is even more objectionable. In describing the importance of public education, this Court has held that "[p]roviding public schools ranks at the very apex of the function of a State." *Yoder*, 406 U.S. at 213. Because operating a public school district is one of the most important governmental powers, Petitioners are simply wrong to declare that providing "public education is . . . no different" from providing "trash disposal or any other standard municipal service" (KJ Br. at 16.)

Petitioners repeatedly argue that they seek here only a neutral application of the laws and that it would be an injustice to deny the Satmars the right to operate their own school. Petitioners' "neutrality," however, is quite different from the "wholesome neutrality" recognized in this Court's prior decisions:

The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.

Abington v. Schempp, 374 U.S. 203, 222 (1963). The question here, of course, is not whether the Satmars are a powerful sect in the United States, but whether they are a powerful sect in the relevant political community and whether they are perpetuating their political power through discriminatory practices. Such is the case of the municipality of Kiryas Joel, which has impermissibly "fus[ed] governmental and religious functions," *id.*, and which has ignored the First Amendment's prohibition

against government's "participat[ion] in the affairs of any religious organizations or groups and *vice versa*." *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947).

II. CHAPTER 748 WAS ENACTED WITH THE UNCONSTITUTIONAL PURPOSE OF CREATING A SCHOOL DISTRICT TO EDUCATE ONLY HASIDIC CHILDREN.

New York's own Commissioner of Education acknowledges that, unlike any other public school district in the state of New York, Kiryas Joel was established for the purpose of creating a religiously segregated school for the benefit of one religious group. Aff. of Thomas Sobol ¶ 6, (J.A. at 76-77). The legislative history supports this observation by revealing that the school district was created not simply to educate hasidic students within the geographical confines of Kiryas Joel, but to create a magnet school that would educate hasidic students who lived throughout Orange county. It was similarly foreseen that if any non-hasidic students ever lived in Kiryas Joel, they would be bused out of the school district to other public schools.

In their effort to portray Chapter 748 as a statute that is neutral with respect to religion, Petitioners argue that the law merely "sets up a school district that is defined *geographically*," (KJ Br. at 20), and that there is nothing exceptionable in establishing a school district whose "boundaries are coterminous with an existing political subdivision," (NY Br. at 13). They also point out that "the statute on its face makes no reference to religion," (KJ Br. at 20); *see also* (KJ Br. at 38). These

observations are, however, *post hoc* justifications that ignore the explicit purpose for enacting Chapter 748.^{21/}

- A. The purpose of Chapter 748 was not to create a school district with "all the powers and duties of a union free school district" (as it states on its face), but to create a funding mechanism for a single program.

Although Chapter 748 provides that: "the Kiryas Joel village school district [] shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law," the legislative history reveals that the proponents of the law did not intend to create a public school district in any meaningful sense of the term, but to establish a single school for a specific religious sect. Indeed, the Trustees of Kiryas Joel urged Governor Cuomo to sign the bill, stating that it would "create *a separate and non-operating school district* within the boundaries of the Village of Kiryas Joel [whose] sole purpose . . . is to provide for the special needs of our handicapped children" Letter from Abraham Wieder to Evan Davis, July 15, 1989, (R. at 694) (emphasis added). Similarly, Monroe-Woodbury Central School District admitted to the Governor's office that: "It is our understanding that the Kiryas Joel school system will, in effect, be *a non-operating school district* except for special education services." Letter from Daniel Alexander to Evan Davis, July 12, 1989, (J.A. at

^{21/} The petitioners repeatedly stress that Chapter 748 is neutral with respect to religion because it is written in geographic and political, rather than religious terms. Of course, it would not be difficult to describe in neutral terms the geographical or political boundaries of the Vatican, Mecca, Qom, the Branch Davidian compound, or Rajneeshpuram, Oregon. The fact that these religious sites can be described in secular geographical or political terms does not, of course, mean that what takes place inside those boundaries is purely secular activity.

21) (emphasis added). Thus it is indisputable that the face of Chapter 748 does not mean what it says because no one ever intended that Kiryas Joel would operate a real public school district.

- B. Chapter 748 was designed to create a magnet school to educate hasidic students from the entire county while sending non-hasidic residents out of Kiryas Joel to other schools.**

In urging Governor Cuomo to sign Chapter 748, the chief legislative-sponsor of the bill, Assemblyman Joseph R. Lentol, explained that the real purpose "was to provide state funded special education programs *to the Hasidic children of the county.*" Letter from Joseph Lentol to Governor Mario Cuomo, July 7, 1989, (J.A. at 19) (emphasis added). Thus the school district was designed not simply to educate children within Kiryas Joel's geographical boundaries, but to create a school where hasidic students throughout the county could be educated. This is exactly what has occurred.

The New York official responsible for monitoring the state's educational programs for the disabled has admitted that hasidic students from the county are bused out of their own public school districts and into Kiryas Joel.

Currently the East Ramapo School District and the [Kiryas Joel school district] have contracted for 17 Satmar children with handicapping conditions who reside in the East Ramapo School District to attend the [Kiryas Joel school]. Likewise, the Monroe-Woodbury Central School District has also contracted with the [Kiryas Joel school district] for 3 of their Satmar children with handicapping conditions to attend the [Kiryas Joel school].

Aff. of Hannah Flegenheimer (Director of the Division of Program Monitoring, Office for Education of Children with Handicapping Conditions), (J.A. at 89).

Unlike the arguments advanced by Petitioners here, the proponents of Chapter 748 did not argue that the statute, which carved a tiny school district out of the center of a larger school district, made any sense from a geographical perspective. They emphasized instead that the program was specifically designed to aid a particular religious sect. The chief legislative sponsor explained that the separate school needed to be created because "[t]he hasidic jewish community hold [sic] firmly to its religious tenets." Letter from Joseph Lentol to Governor Mario Cuomo, July 7, 1989, (J.A. at 19). Another major legislative proponent similarly argued that a program should be established for the Hasidim because they otherwise would need to "sacrifice their religious traditions in order to receive the services which are available to handicapped students throughout the state." Letter from Sheldon Silver to Governor Mario Cuomo, July 24, 1989, (J.A. at 39).

The Superintendent of Petitioner Monroe-Woodbury Central School District acknowledged that, "[i]n practical terms it means [the Hasidim] will be able to run a public school system for special-education children. There is no intent on the village's part to run a public school system for anything else." Mintz, *Hasidic People* 316 (citation omitted). Others involved in the process similarly acknowledged that the beneficiaries were intended to be a specific religious sect.^{22/} The targeting of a

^{22/} "At the time the [Kiryas Joel school district] was created by act of the Legislature, it was known that the district was being created in a community that consisted exclusively of inhabitants of the same religious sect." Sobol Aff., (J.A. at 76). The New York budget office interpreted the law as providing aid that would support the particular religious practices of the Hasidim. (J.A. at 32.)

specific sect for special treatment is unprecedented in the New York educational system. As New York's own Commissioner of Education has acknowledged: "[s]uch accommodations have never been made for the parents of other handicapped children in the State of New York or to my knowledge anywhere in the country." Sobol Aff., (J.A. at 81-82).

Not only was the program specially designed to provide education for the hasidic sect, it also was anticipated that any non-hasidic students who might in the future reside in Kiryas Joel would be bused out of the district to other schools. This is exactly what Petitioner Monroe-Woodbury Central School District's Superintendent of Schools disclosed to Governor Cuomo in urging the governor to sign the bill. "If a non-Hasidic child requiring regular education moved into the Kiryas Joel school district's geographic boundaries (and this is virtually impossible) *the child would be tuitioned to Monroe-Woodbury or another district.*" Letter from Daniel Alexander to Evan Davis, July 12, 1989, (J.A. at 22) (emphasis added). Thus, after recognizing the virtual impossibility of Kiryas Joel's boundaries being opened to non-Satmars, Monroe-Woodbury candidly acknowledged that *even if* such students somehow managed to enter the community, they would be sent out of the village for schooling in another district.

Thus it is inescapable: the Kiryas Joel school district was established to educate solely hasidic children, regardless of whether they lived inside or outside Kiryas Joel's boundaries. The purpose of Chapter 748 was not to give governmental powers to a community because of its geographical location or because it was just another political unit within New York. Chapter 748 was designed to give the governmental power to a

specific religious community to operate one school for the sole benefit of the members of that religious community.²³

CONCLUSION

While the Satmars' theocratic municipality in Kiryas Joel favors their beliefs and practices, other municipalities controlled by other faiths, would just as likely discriminate against them. That is why municipalities in the United States should govern within the parameters of the Constitution — not the rules of the Halachic Codes or the Shari'a.

²³ All of the Petitioners invoke *McDaniel v. Paty*, 435 U.S. 618 (1978). See (KJ Br. at 17, 34, 35, 40); (NY Br. at 22); (MW Br. at 8, 21). In *McDaniel*, this Court properly invoked the Free Exercise Clause to strike down a provision of the Tennessee Constitution that prohibited clergymen from holding legislative office.

Petitioners cite *McDaniel* as somehow standing for the proposition that elected officials in Kiryas Joel should not be disqualified from office because of their religious beliefs or because they share the religious beliefs of the majority of the community. Framing the issue in such a way begs the question. The issue is not whether an individual may be disqualified due to his or her religious status, but whether the religion itself may be established as the basis of a political community. The problem here is not that individuals are being denied a benefit, but that the Satmars, *because of their separatist beliefs*, have been selectively awarded a benefit unavailable to others. *McDaniel* actually stands for a true neutrality that petitioners reject: "*The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such.*" *Id.* at 626 (emphasis added).

For the reasons stated above, Amici respectfully urge this Court to affirm the decisions reached by all three of the New York courts.

Respectfully submitted,

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February 23, 1994

APPENDIX

§ 1. The territory of the village of Kiryas Joel in the town of Monroe, Orange county, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law.

§ 2. Such district shall be under the control of a board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.

§ 3. This act shall take effect on the first day of July next succeeding the date on which it shall have become a law.

Assembly Bill Number 8747, signed into law July 24, 1989 (R. at 90) (emphasis added).

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OFFICE OF THE CLERK

Nos. 93-517, 93-527, 93-539

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE
SCHOOL DISTRICT; and BOARD OF EDUCATION OF THE
MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,
Petitioners,

vs.

TO BE RECOVERED

LOUIS GRUMET and ALBERT W. HAWK,
Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK
COURT OF APPEALS

**BRIEF AMICUS CURIAE
OF THE NEW YORK COMMITTEE
FOR PUBLIC EDUCATION AND
RELIGIOUS LIBERTY
IN SUPPORT OF RESPONDENTS**

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**BRIEF AMICUS CURIAE
OF THE NEW YORK COMMITTEE
FOR PUBLIC EDUCATION AND
RELIGIOUS LIBERTY
IN SUPPORT OF RESPONDENTS**

INTEREST OF THE AMICUS CURIAE

The New York Committee for Public Education and Religious Liberty is an organization consisting of civic, educational, religious, labor and civil rights organizations and individual members. For many years it has engaged in and supported litigation opposing prayers, religious exercises and religious indoctrination in or in connection with public schools and opposing the use of public funds in or in connection with religious schools. In furtherance of its purposes, amicus has

instituted actions, financially supported the prosecution of others, appeared and submitted briefs as *amicus curiae* in still others, testified before legislative and administrative bodies, and engaged in educational programs. Some examples of cases in which amicus has been involved are *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Aguilar v. Felton*, 473 U.S. 492 (1985); *Parents' Ass'n v. Quinones*, 803 F.2d 1235 (2d Cir. 1985); and the instant case when it was before the New York Court of Appeals.

The following organizational members of amicus have expressly requested that they be listed in support of the brief being filed by amicus: American Ethical Union; Episcopal Diocese of Long Island, Commission on Social Concerns and Peace; League for Industrial Democracy; Monroe Citizens for Public Education and Religious Liberty; National Council of Jewish Women, New York Section; National Service Conference of American Ethical Union; New York Society for Ethical Culture; Public Education Association; Rochester Chapter of Americans United for Separation of Church and State; Rockland County Committee for Public Education and Religious Liberty; Union of American Hebrew Congregations; Women's City Club of New York; and Workmen's Circle.

In accordance with Rule 37 of the Rules of this Court, and pursuant to the stipulation between the parties, respondents' letter consenting to the filing of this brief is being filed concurrently with this brief.

INTRODUCTION AND STATEMENT OF THE CASE

Chapter 748 of the New York Laws of 1989 created the Kiryas Joel Village School District. The district's boundaries conform to the Kiryas Joel Village, a community of Satmar Hasidic Jews. Since the local school board members are elected from the district, all are adherents of the Satmar Hasidic faith.

The school district was created to provide for the special educational needs of the Village's handicapped children. Under Chapter 748 as implemented by the school district, the Village's handicapped children receive a publicly funded education in a school physically separate from the private religious schools attended by the other children of the Village.

The New York State School Boards Association and its president and executive director in their official and individual capacities filed suit against the New York State Education Department, the Commissioner of the Department, and others challenging the validity of Chapter 748 under the Establishment Clause of the First Amendment of the United States Constitution and other federal and state limitations. After allowing the two boards of education now listed as the sole petitioners to intervene as defendants, the state trial court granted plaintiffs' motion for summary judgment, finding that Chapter 748 violates the federal Establishment Clause and its New York constitutional counterpart. 579 N.Y.S.2d 1004 (N.Y. Sup. Ct. 1992). An intermediate appellate court held that the institutional plaintiff and the plaintiff officers in their official capacities lack standing. Finding, however, that the plaintiff officers have standing in their individual capacities, the court affirmed both the trial court's ruling and the federal and state constitutional grounds upon which it relied. 592 N.Y.S.2d 123 (N.Y. App. Div. 1992). The New York Court of Appeals agreed with the courts below that the statute violates the federal Establishment Clause but declined to reach the state constitutional ground. 81 N.Y.2d 518, 618 N.E.2d 94 (1993).

This brief will argue that Chapter 748 violates the Establishment Clause of the First Amendment, applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Everson v. Board of Educ.*, 330 U.S. 1 (1947). Part I will discuss the applicable Supreme Court test for deciding the constitutionality of Chapter 748 under the Establishment Clause. Parts II-IV will demonstrate that Chapter 748 fails to

satisfy each of the three parts of the applicable test. Part V will maintain in conclusion that Chapter 748 is in obvious violation of the Establishment Clause and should be struck down.

ARGUMENT

I. THE APPLICABLE TEST

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court adopted a three-part test for deciding constitutionality under the Establishment Clause. The Court held that, to satisfy the Establishment Clause, a law must have "a secular legislative purpose," its "principal or primary effect must neither advance nor inhibit religion," and it must not "foster 'excessive government entanglement with religion.'" *Id.* at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)). The Court made clear that if any of the test's three prongs is not met, the law under review violates the Establishment Clause and should be struck down.

The Supreme Court has applied the test announced in *Lemon* in subsequent Establishment Clause cases except for *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Lee v. Weisman*, ___ U.S. ___, 112 S. Ct. 2649 (1992). The Court's grounds for not applying the test in *Marsh* and *Lee* do not cast doubt on the precedential force of the *Lemon* test for the case at hand. *Marsh* and *Lee* are readily distinguished.

In *Marsh* the Court rejected an Establishment Clause challenge to a state legislature's practice of opening its sessions with a prayer by a state-paid chaplain. In rejecting the challenge without expressly examining the practice's consistency with the *Lemon* test, the Court emphasized the "unique history," *Marsh*, *supra*, 463 U.S. at 791, of legislative prayer in the United States. Most notably, the practice has widely existed in this country since colonial times, and the Congress that proposed the First Amendment for state ratification explicitly authorized

the appointment of paid chaplains to open its sessions with prayer. *Id.* at 786-90. Based on this "unique history," the Court found it apparent that the framers of the First Amendment "saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged." *Id.* at 791. In essence, finding persuasive, specific evidence that the framers intended that legislative prayer be allowed, the Court felt no obligation to consider the practice's constitutionality under the *Lemon* test.

The case at hand involves state action of a sort that does not arguably have the type of "unique history" that the Court found so probative in *Marsh*. The creation of public school districts coterminous with religious enclaves is neither a time-honored tradition in the United States nor one that the framers of the Establishment Clause gave the slightest indication of approving. The Court's nonapplication of the *Lemon* test in *Marsh* is therefore not relevant precedent for nonapplication of the test to Chapter 748.

In *Lee v. Weisman, supra*, the Court held that the Establishment Clause bars clergy-offered prayers at public school graduations. In sustaining the Establishment Clause challenge without expressly considering whether such prayers meet the *Lemon* test, the Court explicitly declined to "accept the invitation of petitioners and *amicus* the United States to reconsider our decision in *Lemon v. Kurtzman*." *Lee, supra*, __ U.S. at __, 112 S. Ct. at 2655. In the Court's view, the practice under review so plainly begged for invalidation under the Establishment Clause that there was no need to examine its constitutionality under a test designed to handle more subtle problems:

The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to

prayer exercises for students, and that suffices to determine the question before us.

Id.

Although some members of the Court at times have criticized the *Lemon* test as unduly restrictive of state prerogatives, a majority of the Court has continued to recognize both its basic wisdom and its superiority to proposed alternatives taking a substantially more relaxed view of Establishment Clause constraints. Respect for precedent strongly calls for application of the *Lemon* test in the case at hand. Moreover, as even those most skeptical of the test should be willing to concede, the instant case in any event hardly provides a logical occasion for seriously examining the merits of the test. As indicated by the analysis in Parts II-IV *infra* and as highlighted in Part V, the law at issue is so patently incompatible with the Establishment Clause that it, like the practice invalidated in *Lee*, fails to satisfy even the most basic conception of Establishment Clause constraints.

II . CHAPTER 748 LACKS THE REQUISITE SECULAR PURPOSE

The first prong of the *Lemon* test requires that a law have "a secular legislative purpose." *Lemon, supra*, 403 U.S. at 612. In applying this prong, courts should look to the legislature's actual motivation. See, e.g., *Wallace v. Jaffree*, 474 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980). They are not obliged to accept a particular secular purpose as real simply because the state asserts it. For a law to survive this prong, it must rest at least in part on "a clearly secular purpose," *Wallace v. Jaffree, supra*, 474 U.S. at 56, and its "pre-eminent purpose" must not be "plainly religious in nature," *Stone v. Graham, supra*, 449 U.S. at 41. Although the first prong's secular purpose requirement is not especially demanding, Chapter 748 fails to meet it.

According to the petitioners, Chapter 748 serves the secular purpose of providing special educational services to handicapped children currently not receiving such services. This statement of purpose, however, is conveniently incomplete. It fails to take account of two basic realities. First, the handicapped children of Kiryas Joel would have been receiving these services before the enactment of Chapter 748 but for their parents' refusal to allow them to be educated outside of Kiryas Joel. Chapter 748 was the culmination of years of controversy and litigation between Kiryas Joel and the Monroe-Woodbury Central School District of which it was a part -- controversy and litigation sparked by these parents' refusal to allow their children to avail themselves of these services by attending the Monroe-Woodbury public schools. *See Board of Educ. of Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 N.Y.2d 174, 527 N.E.2d 767 (1988).

Second, although framed in terms of concern for the emotional and psychological well-being of the Village's handicapped children, this refusal was intimately related to certain religiously based preferences. According to the petitioners, the children's cloistered and culturally distinctive existence to date in Kiryas Joel places them at high risk of emotional and psychological trauma from contact with children of other backgrounds. The children's cloistered and culturally distinctive existence, however, is hardly an accident. It is the direct result of their parents' decision to isolate them from non-Satmar children in order to avoid exposure to influences that might weaken their commitment to the Satmar Hasidic faith. *See generally* Allan L. Nadler, *Piety and Politics: The Case of the Satmar Rebbe*, JUDAISM, Spring 1982, at 135.

In short, the purpose of Chapter 748 cannot reasonably be understood as one of simply providing special educational services to handicapped children currently without such services. Rather, it must be understood as one of providing these services in a manner that conforms to the religiously based preferences

of parents sharing the Satmar Hasidic faith. So understood, the purpose fails to supply the secular justification needed to satisfy the first prong of the *Lemon* test.

Justice O'Connor has forcefully argued that, though not religiously neutral, a purpose of lifting a substantial state-imposed burden on free exercise should be regarded as "secular" within the meaning of the *Lemon* test. See *Wallace v. Jaffree*, *supra*, 474 U.S. at 81-83 (O'Connor, J., concurring). The state's purpose in the instant case, however, plainly fails to meet this description. Here, as in the prior litigation with the Monroe-Woodbury Central School District, the parents "insisted that, as a class, they should be exempted from public school placements only for *nonreligious* reasons -- most particularly because of the emotional impact on the children of traveling out of Kiryas Joel." *Board of Educ. v. Wieder*, *supra*, 72 N.Y.2d at 189, 527 N.E.2d at 775 (emphasis in the original). As then-Judge, now-Chief Judge, Kaye wrote for a unanimous court in that earlier litigation, having "made no showing that any sincere religious beliefs were threatened" by the public school placements, the parents have provided "no basis" for a judicial finding of a substantial state-imposed burden on free exercise rights. *Id.*

Chapter 748 lacks the secular purpose required by the first prong of the *Lemon* test. It therefore violates the Establishment Clause and should be struck down.

III. CHAPTER 748 HAS THE PRINCIPAL OR PRIMARY EFFECT OF ADVANCING RELIGION

Under the second prong of the *Lemon* test, a law is unconstitutional unless its "principal or primary effect . . . neither advances nor inhibits religion." *Lemon*, *supra*, 403 U.S. at 612. The Court clarified this prong of the test in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). The Court in *Nyquist* explained that the reference to "principal or

primary" should not be taken literally. In applying the second prong, courts are not expected to engage in "metaphysical judgments" as to whether a particular effect is actually the law's principal or primary one. *See id.* at 783-84 n.39. Rather, they should try to ascertain whether the law has an effect of advancing or inhibiting religion that is "direct and substantial" as opposed to "remote and incidental." *See id.* Effects of the former variety are forbidden by the Establishment Clause, and laws having such effects should be struck down. *See generally* Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 917-23 (1987) (discussing "principal or primary effect," as used in the second prong).

Even if the analysis in Part II *supra* fails to persuade this Court that Chapter 748 is so lacking in secular purpose as to fail the relatively lenient first prong, it at a minimum should convince the Court that Chapter 748 is based in substantial part on a nonsecular purpose so apparent that Chapter 748 necessarily has the type of "direct and substantial" effect of advancing religion prohibited by the second prong. Very simply, given the statute's obvious purpose of providing services in a way that conforms to the religiously based preferences of parents sharing the Satmar Hasidic faith, it virtually cannot help but be perceived by adherents and nonadherents of the faith alike as state sponsorship of religion -- one of the "three main evils" that the Establishment Clause was intended to avoid. *See Lemon, supra*, 403 U.S. at 612 (identifying these evils as "sponsorship, financial support, and active involvement of the sovereign in religious activity"). Time and again, the Court has emphasized that an effect of endorsing a particular religion or religious belief is antithetical to the clause. *See, e.g., Allegheny County v. ACLU*, 492 U.S. 573, 592-94 (1989); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 389-90 (1985); *Engel v. Vitale*, 370 U.S. 421, 436 (1962). As Justice O'Connor explained in a discussion of endorsement later cited approvingly

by a majority of the Court, *see Allegheny County, supra*, 492 U.S. at 593-94, government endorsement of religion is so objectionable because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

The fact that this endorsement occurs in the context of providing educational services for the young compounds its constitutional difficulties. As the Court underlined in the course of finding that certain state programs for nonpublic school children violated the second prong of the *Lemon* test:

The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years. The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.

Grand Rapids, supra, 473 U.S. at 390 (citations omitted).

In the case at hand, the children of Kiryas Joel are imbued with a feeling that "they are insiders, favored members of the political community," *Lynch, supra*, 465 U.S. at 688 (O'Connor, J., concurring), while the children of the Monroe-Woodbury schools -- the children that Chapter 748 enables the Kiryas Joel children to avoid -- are imbued with the feeling that "they are outsiders, not full members of the political community," *id.* Although the needs of the handicapped children of Kiryas Joel may be the focal point of this dispute, the sensitivities of the children in the Monroe-Woodbury Central School District cannot reasonably or constitutionally be ignored.

If there were overwhelming, or at least strong, evidence that attending the Monroe-Woodbury public schools was likely to

harm the Kiryas Joel children in the ways that petitioners claim, it perhaps might be tempting to view Chapter 748's effect of endorsing religion as "indirect" or "incidental" and therefore not prohibited by the second prong. See *Nyquist, supra*, 413 U.S. at 783-84 n.39. The evidence presented in support of the claim of imminent psychological and emotional harm is hardly strong, however. Virtually nonexistent would be a more apt description. Indeed, not only is this claim essentially based on no more than conjecture and bald assertion; there is also reason to doubt that it is made in good faith. The unanimous federal appellate opinion in *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986), offers a perspective on the Satmar Hasidim's insistence on keeping their children apart from public school children that belies their contention here that they are motivated by concern for their children's psychological and emotional well-being. Addressing an Establishment Clause challenge to a New York City educational plan designed to satisfy demands by Satmar Hasidim for separate services for their children, the Court identified a much less sympathetic motivating force for the Satmar Hasidim's insistence on separation -- rank dislike of, and prejudice against, anyone outside their faith:

They are reported [in various newspaper articles submitted in evidence] as seeing Hispanics as "different" and "not a good influence on [the Hasidic] girls," and as believing that educating Hasidic children in the company of Hispanic children would "corrupt[]" the Hasidic children. The lengths to which the City has gone to cater to these religious views, which are inherently divisive, are plainly likely to be perceived, by the Hasidim and others, as governmental support for the separatist tenets of the Hasidic faith. Worse still, to impressionable young minds, the City's Plan may appear to endorse not only separatism, but the derogatory rationale for separatism expressed by some of the Hasidim.

Id. at 1241.

In sum, realism requires the recognition that the state's adoption of Chapter 748 strongly communicates state endorsement of the Satmar Hasidim's religiously based preference for separatism. Moreover, as the Second Circuit warned in *Parents' Ass'n of P.S. 16* (*see id.* at 1241), "[w]orse still, to impressionable young minds," the statute may appear to endorse "not only separatism, but the derogatory rationale for separatism" that some Satmar Hasidim have publicly offered in the past. The "symbolic union of government and religion," *see Grand Rapids, supra*, 473 U.S. at 392, effected by Chapter 748 mandates invalidation of Chapter 748 under the *Lemon* test's second prong.

IV. CHAPTER 748 FOSTERS EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION

The third and final prong of the *Lemon* test requires that a statute "not foster 'an excessive government entanglement with religion.'" *Lemon, supra*, 403 U.S. at 613 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). The Court in *Lemon* clarified the nature of this prohibition when it invalidated under the third prong a state law funding salary supplements for teachers of secular subjects in parochial schools. The Court perceived a serious danger that the teachers would misuse the aid by injecting religion into their teaching of secular subjects, because "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." *Lemon, supra*, 403 U.S. at 618. The Court then reasoned that to ensure that the aid did not support any teaching of religion, the state would have to undertake "comprehensive, discriminating, and continuing state surveillance" of the teachers receiving the aid. *Id.* at 619.

According to the Court, however, these essential "prophylactic contacts" were unacceptable under the Establishment Clause, because they "involve[d] excessive and enduring entanglement between state and church." *Id.*

Three subsequent applications of the third prong are particularly relevant to the case at hand. All three involve the use of publicly employed teachers to provide parochial school students with remedial instruction or other special educational services of a secular nature. In the two cases in which the services were furnished on parochial school premises, the Court invalidated the programs under the third prong. *See Aguilar v. Felton*, 473 U.S. 402 (1985); *Meek v. Pittenger*, 421 U.S. 349, 367-72 (1975). According to the Court in *Meek*:

The fact that the teachers and counselors providing auxiliary services are employees of the public intermediate unit, rather than of the church-related schools in which they work, does not substantially eliminate the need for continuing surveillance. To be sure, auxiliary-services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. *Cf. Lemon v. Kurtzman*, 403 U.S., at 618. But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. *See id.*, at 618-19....

Meek, supra, 421 U.S. at 371. To similar effect, *see Aguilar, supra*, 473 U.S. at 412 ("The critical elements of the entanglement proscribed in *Lemon* and *Meek* are thus present in this case. . . . [T]he aid is provided in a pervasively sectarian environment. Second, because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message.").

In the one case in which the services were furnished off parochial school premises -- in public schools, public centers, or mobile units -- the Court found no violation of the third prong. *Wolman v. Walter*, 433 U.S. 229, 244-48 (1977). According to the Court in *Wolman*, the danger that a publicly employed teacher might inject religion into his instruction existed in *Meek* "because the pressures of the environment might alter his behavior from its normal course. So long as these types of services are offered at truly religiously neutral locations, the danger perceived in *Meek* does not arise." *Id.* at 247.

On the surface, the furnishing of instruction to handicapped children in the Kiryas Joel public school may appear to resemble most closely the situation in *Wolman* and therefore to hold no more potential for fostering entanglement than the Court found acceptable in *Wolman*. As in *Wolman*, a religiously homogeneous group of students is receiving purportedly secular instruction at an ostensibly "neutral" site. The handicapped children of the Village are being taught in a public building by publicly employed teachers selected without regard to religious beliefs, and the entire program is under the auspices of a secular superintendent.

Upon closer examination of the realities of the Kiryas Joel public school, however, the analogy to *Wolman* loses its force. Certain salient facts about the school indicate the school's much closer affinity to the parochial schools in *Lemon*, *Meek*, and *Aguilar* than the neutral sites in *Wolman*. Most notably, the school is located in a "pervasively sectarian" village, a religious enclave in which virtually every aspect of the villagers' daily life is governed by the precepts of their Satmar Hasidic faith. In addition, although the superintendent and teachers may not be Satmar Hasidim, every member of the school board is. When these additional facts are taken into account, it becomes obvious that the only way in which genuinely religiously neutral teaching possibly could be ensured is by the "comprehensive, discriminating, and continuing state surveillance" that the *Lemon*

Court found prohibited by the third prong. Chapter 748 fares no better under the third prong of the *Lemon* test than it fares under the first two.

V. CONCLUSION

For the reasons set forth in Parts II-IV *supra*, Chapter 748 fails to satisfy all three parts of the *Lemon* test. Although a statute's failure to meet any one part of the test requires its invalidation under the Establishment Clause, the fact that Chapter 748 does not meet all three parts is not without significance. It underlines how closely this statute strikes at the heart of the Establishment Clause and the values it represents.

Writing for the Court in *Lee v. Weisman, supra*, Justice Kennedy cited as a "fundamental" and "central" principle that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." __ U.S. at __, 112 S. Ct. at 2655. Finding this constitutional "minimum" violated by the practice of clergy-offered graduation prayers, Justice Kennedy dispensed in *Lee* with application of the *Lemon* test, a test attuned to detecting less blatant violations of the clause. As suggested by Chapter 748's three-fold violation of the *Lemon* test, it too so blatantly violates the Establishment Clause that it fails to satisfy even obvious constitutional minimums. Unlike the practice under review in *Lee*, Chapter 748 does not coerce anyone to "participate in religion or its exercise." *See id.* By using tax-raised funds to sponsor and advance the Satmar Hasidic faith, however, Chapter 748 does coerce the people of New York State to "support . . . religion or its exercise." *See id.* Indeed, on an even more basic level, Chapter 748 can reasonably be seen as not simply a law "respecting" -- that is, tending to lead to -- "an establishment of religion" (*see* U.S. Const. amend. I), but instead as a law actually creating such an establishment. By forming a school district with

boundaries coterminous with a religious enclave, the statute essentially creates a governmental unit with an official religion.

Application of the *Lemon* test thus confirms what should be apparent from the most basic understanding of Establishment Clause principles: that Chapter 748 is fundamentally at odds with the clause and should be struck down.

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Respectfully submitted,

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